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Second report on subsequent agreements and subsequent practice in relation to the interpretation of treaties

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Contents

		Page
I.	Introduction	3
II.	Identification of subsequent agreements and subsequent practice	4
	1. Conduct "in the application" and "regarding the interpretation" of the treaty	4
	2. Conduct not "in the application of" the treaty or "regarding its interpretation"	5
	3. Determination whether conduct is "in the application" or "regarding the interpretation" of a treaty	6
	4. Conclusion	11
III.	Possible effects of subsequent agreements and subsequent practice in interpretation	11
	1. Case law of the International Court of Justice	12
	2. State practice	15
	3. Specificity of practice	18
IV.	Form and value of subsequent practice under article 31 (3) (b)	20
	1. Variety of possible forms of subsequent practice under article 31 (3) (b)	20
	2. Density and uniformity of subsequent practice	21

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V. Agreement of the parties regarding the interpretation of a treaty 24
1. Existence and scope of agreement 24
2. An "agreement" under article 31 (3) may be informal 26
3. Awareness of the parties of their agreement 27
4. An agreement under article 31 (3) need, not as such, be legally binding 27
5. Silence as a possible element of an agreement under article 31 (3) 29
6. Subsequent practice as indicating agreement on a temporary non-application of a treaty or merely on a practical arrangement 33
7. Changing or ending of an agreement regarding interpretation under article 31 (3) (a) or (b) 35
VI. Decisions adopted within the framework of Conferences of States Parties 36
1. Forms of Conferences of States Parties 36
2. Types of acts adopted by States parties within the framework of a Conference of States Parties 37
3. Subsequent agreements and subsequent practice under article 31 (3) may result from Conferences of States Parties 39
4. Form and procedure 44
5. Acts not adopted in the presence of all parties to a treaty 48
VII. Scope for interpretation by subsequent agreements and subsequent practice 49
1. Specific interpretation procedures and article 31 (3) (a) and (b) 49
2. The relationship between interpretation and modification 50
3. Modification of a treaty by subsequent agreements or subsequent practice 51
VIII. Future programme of work 69
Annex
Proposed draft conclusions 70

I. Introduction

1. During its sixty-fifth session (2013), the Commission considered the first report on the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties" and provisionally adopted five draft conclusions with commentaries.[1] These draft conclusions:

- Situate the topic within the general framework of the rules on the interpretation of treaties as reflected in the Vienna Convention on the Law of Treaties (draft conclusion 1);
- Characterize subsequent agreements and subsequent practice under article 31 (3) as authentic means of interpretation (draft conclusion 2);
- Circumscribe the relationship between subsequent agreements, subsequent practice and the conditions under which treaty terms may be interpreted as evolving over time (draft conclusion 3);
- Formulate definitions of a subsequent agreement and two forms of subsequent practice (draft conclusion 4);
- Address the attribution of subsequent practice (draft conclusion 5).

2. During the debate in the Sixth Committee on the report of the Commission on its sixty-fifth session, States generally reacted favourably to the work of the Commission on the topic.[2] Specific matters and concerns which were raised in the debate will be addressed in the present report as well as when the Commission reviews the draft conclusions according to its procedures. Relevant developments since the sixty-fifth session of the Commission include the judgments of the International Court of Justice in the *Maritime Dispute (Peru* v. *Chile)*[3] and *Whaling in the Antarctic (Australia* v. *Japan: New Zealand intervening)*[4] cases.

The second report covers the following aspects of the topic:

- The identification of subsequent agreements and subsequent practice (II.);[5]
- Possible effects of subsequent agreements and subsequent practice in the interpretation of treaties (III.);

[1] Report of the International Law Commission on its sixty-fifth session (A/68/10), chap. IV, paras. 29-39.

[2] The statements delivered by States during the debate of the Sixth Committee of the General Assembly on the topic "Report of the International Law Commission on the work of its sixty-third and sixty-fifth sessions (agenda item 81)" are available from https://papersmart.unmeetings.org/ga/sixth/68th-session/agenda/81 (all Internet sources in the present report have been accessed on 24 February 2014).

[3] *I.C.J., Judgment of 27 January 2014*. Available from www.icj-cij.org/docket/files/137/17930.pdf.

[4] *I.C.J., Judgment of 31 March 2014*, available from www.icj-cij.org/docket/files/148/18136.pdf. See also *Request for Interpretation of the Judgment of 15 June 1962 in the case concerning the Temple of Preah Vihear* (*Cambodia* v. *Thailand*) (*I.C.J., Judgment of 11 November 2013*, available from www.icj-cij.org/docket/files/151/17704.pdf), para. 75.

[5] Article 31 (3) (a) synonymously speaks of subsequent agreement "between the parties".

- The form and value of subsequent practice under article 31 (3) (b) (IV.);[6]
- The conditions for an "agreement" of the parties regarding the interpretation of a treaty under article 31 (3) (V.);[7]
- Decisions adopted within the framework of Conferences of State Parties (VI.); and
- The possible scope for interpretation by subsequent agreements and subsequent practice (VII).

II. Identification of subsequent agreements and subsequent practice

3. Subsequent agreements and subsequent practice, as means of interpretation, must be identified as such.

1. Conduct "in the application" and "regarding the interpretation" of the treaty

4. Subsequent practice under articles 31 (3) (b) and 32 must be "in the application of the treaty" and subsequent agreements under article 31 (3) (a) must be "regarding the interpretation of the treaty or the application of its provisions".[8] Although there may be aspects of "interpretation" which remain unrelated to the "application" of a treaty,[9] every application of a treaty presupposes its interpretation — even if the rule in question may appear to be clear on its face.[10] Therefore, conduct "regarding the interpretation" of the treaty and conduct "in the application" of the treaty both imply that one or more States parties assume, or are

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[6] The Commission has left this question pending (see A/68/10, p. 37, para. 20); the sequence follows a distinction made by the World Trade Organization (WTO) Appellate Body which noted in *United States — Gambling* that "subsequent practice" involves two elements: "... (i) there must be a common, consistent, discernible pattern of acts or pronouncements; and (ii) those acts or pronouncements must imply agreement on the interpretation of the relevant provision" (see World Trade Organization, *European Communities and its Member States: Tariff Treatment of Certain Information Technology Products*, Reports of the Panel (16 August 2010), WT/DS375/R, WT/DS376/R and WT/DS377/R, para. 7.558.

[7] The Commission has left this question pending (see A/68/10, para. 16).

[8] See draft conclusion 4, paras. 1-3 (A/68/10, p. 12).

[9] According to G. Haraszti, interpretation has "the elucidation of the text as to its meaning as its objective" whereas application "implies the specifying the consequences devolving on the contracting parties" (see G. Haraszti, *Some Fundamental Problems in the Law of Treaties* (Akadémiai Kiadó, 1973), p. 18); he recognizes, however, that "a legal rule manifesting itself in whatever form cannot be applied unless its content has been elucidated" (ibid.).

[10] Report of the Study Group of the International Law Commission on the fragmentation of international law (A/CN.4/L.682 and Corr. 1, para. 423; R. Gardiner, *Treaty Interpretation* (Oxford, Oxford University Press, 2008), pp. 27-29 and 213; M. K. Yasseen, "L'interprétation des traités d'après la Convention de Vienne sur le droit des traités", *Recueil des cours de l'Académie de droit international de La Haye*, vol. 151, 1976), p. 47; U. Linderfalk, "Is the hierarchical structure of articles 31 and 32 of the Vienna Convention real or not? Interpreting the rules of interpretation", *Netherlands International Law Review*, vol. 54, No. 1 (2007), pp. 141-144 and p. 147; G. Distefano, "La pratique subséquente des États parties à un traité", *Annuaire français de droit international*, vol. 40, 1994, p. 44; M. E. Villiger, "The rules on interpretation: misgivings, misunderstandings, miscarriage? The 'crucible' intended by the International Law Commission" in *The Law of Treaties beyond the Vienna Convention*, E. Cannizzaro, ed. (Oxford, Oxford University Press, 2011), p. 111.

attributed, a position regarding the interpretation of the treaty.[11] Whereas in the case of a "subsequent agreement between the parties regarding the interpretation of the treaty" under article 31 (3) (a) (first alternative), the position regarding the interpretation of a treaty is specifically and purposefully assumed, this may be less clearly identifiable in the case of a "subsequent agreement ... regarding ... the application of its provisions" under article 31 (3) (a) (second alternative).[12] Such an assumption of a position regarding interpretation "by application" is implied in simple acts of application of the treaty, that is, in "every measure taken on the basis of the interpreted treaty",[13] under articles 31 (3) (b) and 32.[14]

5. It is difficult to conceive of conduct "in the application of the treaty" which does not imply the assumption by the acting State party of a position "regarding the interpretation" of the treaty. In fact, conduct by which the acting State cannot be said to assume a position regarding the interpretation of the treaty also cannot be undertaken "in" its "application". It follows that conduct "in the application of the treaty" is only an example, albeit the most important one, of all acts "regarding the interpretation" of a treaty. The word "or" in article 31 (3) (a) thus does not designate an alternative but rather an example of the same thing.

6. It should be noted that an "application" of the treaty does not necessarily reflect the position of a State party that it is the only legally possible one under the treaty and under the circumstances.[15] Further, the concept of "application" does not exclude practices by non-State actors which the treaty recognizes as forms of its application and which are attributable to one or more of its parties.[16]

2. Conduct not "in the application of" the treaty or "regarding its interpretation"

7. Subsequent conduct which takes place regardless of a treaty obligation is not "in the application of the treaty" or "regarding" its interpretation. In the *Certain Expenses* case, for example, some judges doubted whether the continued payment of their membership contributions signified acceptance by the Member States of the United Nations of a certain practice of the organization.[17] Judge Fitzmaurice formulated a well-known warning in this context, according to which "the argument

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[11] Gardiner, *Treaty Interpretation*, p. 235; U. Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Dordrecht, Springer, 2007), p. 162; W. Karl, *Vertrag und spätere Praxis im Völkerrecht*, vol. 84, *Beiträge zum ausländischen öffentlichen Recht und Völkerrecht* (Berlin, Springer, 1983), pp. 114 and 118; O. Dörr, "Article 31. General rule of interpretation", in *Vienna Convention on the Law of Treaties — A Commentary*, O Dörr and K. Schmalenbach, eds. (Springer, 2012), p. 556, paras. 80 and 82.

[12] This second alternative was introduced at the proposal of Pakistan, but its scope and purpose was never addressed and clarified, see *Official Records of the United Nations Conference on the Law of Treaties, Official Records*, A/CONF.39/11, at p. 168, para. 53.

[13] Linderfalk, supra note 11, pp. 164-165 and 167.

[14] See draft conclusions 1 (4) and 4 (3), supra note 1, p. 12.

[15] See 3 below and III.2.(b).

[16] See L. Boisson de Chazournes, "Subsequent Practice, Practices, and 'Family Resemblance': Towards Embedding Subsequent Practice in its Operative Milieu" in G. Nolte (ed.), *Treaties and Subsequent Practice* (Oxford University Press, 2013), p. 53, at pp. 54, 56 and 59-60.

[17] *Certain Expenses of the United Nations, Advisory Opinion, I.C.J. Reports 1962*, p. 151, at pp. 201-202 (*Separate Opinion of Judge Fitzmaurice*) and pp. 189-195 (*Separate Opinion of Judge Spender*).

drawn from practice, if taken too far, can be question-begging".[18] According to Fitzmau-rice, it would be "hardly possible to infer from the mere fact that Member States pay, that they necessarily admit in all cases a positive legal obligation to do so".[19]

8. Similarly, in the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* case, the International Court of Justice held that an effort by the parties to the Agreement of 1987 (on the submission of a dispute to the jurisdiction of the Court) to conclude an additional Special Agreement (which would have specified the subject matter of the dispute) did not mean that the conclusion of such an additional agreement was actually considered by the parties to be required for the establishment of the jurisdiction of the Court.[20]

9. Another example of a voluntary practice which is not meant to be "in application of" or "regarding the interpretation" of a treaty concerns "complementary protection" in the refugee law context. Persons who are denied refugee status under the Refugee Convention are nonetheless often granted "complementary protection", which is equivalent to that under the Convention. States which grant complementary protection, however, do not consider themselves as acting "in the application of" the Convention.[21]

10. It is sometimes difficult to distinguish relevant subsequent agreements or practice regarding the interpretation or in the application of a treaty under articles 31 (3) (a) and (b) and 32 from other conduct or developments in the wider context of the treaty, including from "contemporaneous developments" in the area of the treaty. Such a distinction is, however, important since only conduct regarding the interpretation by one or more parties introduces their specific authority into the process of interpretation. Suffice it to say at this point that the more specifically an agreement or a practice is related to a treaty the more probative or interpretative value it can acquire under articles 31 (3) (a) and (b) and 32.[22] The judgment in the *Maritime Dispute (Peru* v. *Chile)* case provides only the latest example for the need, but also for the occasional difficulty of drawing the distinction.[23]

3. Determination whether conduct is "in the application" or "regarding the interpretation" of a treaty

11. The characterization of a subsequent agreement or subsequent practice under articles 31 (3) and 32 as assuming a position regarding the interpretation of a treaty often requires a careful factual and legal analysis. This can be illustrated by examples from judicial and State practice.

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[18] Ibid., p. 201.

[19] Ibid.

[20] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1995*, p. 6, at p. 76, para. 28.

[21] See A. Skordas, "General provisions: article 5", in *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: A Commentary*, A. Zimmermann, ed. (Oxford, Oxford University Press, 2011), p. 682, para. 30; J. McAdam, *Complementary Protection in International Refugee Law* (Oxford, Oxford University Press, 2007), p. 21.

[22] On the (probative or interpretative) "value" of an agreement or practice as a means of interpretation, see chap. IV below.

[23] *Maritime Dispute (Peru* v. *Chile)*, paras. 103, 104-117 and 118-151 (see footnote 3 above).

(a) International Court of Justice

12. The jurisprudence of the International Court of Justice provides a number of examples where, what at first sight may have appeared relevant, was ultimately not found to be a pertinent subsequent agreement or practice, and vice versa. Thus, on the one hand, the Court did not consider a "Joint Ministerial Communiqué" to "be included in the conventional basis of the right of free navigation" since the "modalities for cooperation which they put in place are likely to be revised in order to suit the parties."[24] The Court has held, however, that the lack of certain assertions regarding the interpretation of a treaty, or the absence of certain forms of its application, constituted a practice which indicated the legal position of the parties according to which nuclear weapons were not prohibited under various treaties regarding poisonous weapons.[25] In any case, the exact significance of a collective expression of views of the parties can only be identified by careful consideration as to whether and to what extent it is meant to be "regarding the interpretation" of the treaty. Accordingly, the Court held in the *Whaling in the Antarctic* case that "relevant resolutions and Guidelines [by the International Whaling Commission] that have been approved by consensus call upon States parties to take into account whether research objectives can practically and scientifically be achieved by using non-lethal research methods, but they do not establish a requirement that lethal methods be used only when other methods are not available."[26]

(b) Iran-United States Claims Tribunal

13. When the Iran-United States Claims Tribunal was confronted with the question of whether the Claims Settlement Declaration obliged the United States to return military property to Iran, inter alia, by referring to the subsequent practice of the parties, the Tribunal found that this treaty contained an implicit obligation of compensation in case of non-return:[27]

> 66. [...] Although Paragraph 9 of the General Declaration does not expressly state any obligation to compensate Iran in the event that certain articles are not returned because of the provisions of U.S. law applicable prior to 14 November 1979, the Tribunal holds that such an obligation is implicit in that Paragraph. (...)
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> 68. Moreover, the Tribunal notes that the interpretation set forth in paragraph 66 above is consistent with the subsequent practice of the Parties in the application of the Algiers Accords and, particularly, with the conduct of the

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[24] *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, p. 213, at p. 234, para. 40; see also *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999*, p. 1045, at p. 1091, para. 68 where the Court implied that one of the parties did not consider that certain forms of practical cooperation were legally relevant for the purpose of the question of boundary at issue and thus did not agree with a contrary position of the other party.

[25] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 248, paras. 55-56; see also *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 803, at p. 815, para. 30; Gardiner, *Treaty Interpretation*, pp. 232-235 (see footnote 10 above).

[26] *Whaling in the Antarctic (Australia* v. *Japan: New Zealand intervening), I.C.J, Judgment of 31 March 2014*, www.icj-cij.org/docket/files/148/18136.pdf, para. 83.

[27] Iran-United States Claims Tribunal, Partial Award No. 382-B1-FT, *The Islamic Republic of Iran and the United States of America*, Iran-USCTR, vol. 19 (1989), pp. 294-295.

> United States. Such a practice, according to Article 31 (3) (b) of the Vienna Convention, is also to be taken into account in the interpretation of a treaty. In its communication informing Iran, on 26 March 1981, that the export of defence articles would not be approved, the United States expressly stated that "Iran will be reimbursed for the cost of equipment in so far as possible."

This position was criticized by Judge Holtzmann in his dissenting opinion:

> Subsequent conduct by a State party is a proper basis for interpreting a treaty only if it appears that the conduct was motivated by the treaty. Here there is no evidence, or even any argument, that the United States' willingness to pay Iran for its properties was in response to a perceived obligation imposed by Paragraph 9. Such conduct would be equally consistent with a recognition of a contractual obligation to make payment. In the absence of any indication that conduct was motivated by the treaty, it is incorrect to use that conduct in interpreting the treaty.[28]

Together, the majority opinion and the dissent clearly identify the relevant points.

(c) European and Inter-American Courts of Human Rights

14. The fact that States parties assume a position regarding the interpretation of a treaty may sometimes also be inferred from the character of the treaty or of a specific provision. Whereas subsequent practice in the application of a treaty often consists of acts by different organs of the State (executive, legislative or judicial) in the conscious application of a treaty at different levels (domestic and international), the European Court of Human Rights, for example, typically does not explicitly address the question whether a particular practice was undertaken "in the application" or "regarding the interpretation" of the Convention,[29] or whether the State was thereby assuming a legal position. Thus, when describing the domestic legal situation in the member States, the Court rarely asks whether this legal situation results from a legislative process during which the possible requirements of the Convention were discussed. The Court nevertheless presumes that the member States, when legislating or otherwise acting in a particular way, are conscious of their obligations under the Convention, and that they act in a way which reflects their bona fide understanding of their obligations.[30] Like the International Court of Justice, the European Court of Human Rights has occasionally even considered that the "lack of any apprehension" of the parties regarding a certain interpretation of the Convention may be indicative of their

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[28] Separate Opinion of Judge Holtzmann, Concurring in Part, Dissenting in Part in Iran-United States Claims Tribunal, Partial Award No. 382-B1-FT, *The Islamic Republic of Iran and the United States of America*, Iran-USCTR, vol. 19 (1989), p. 304.

[29] See, e.g., *Soering v. the United Kingdom*, 7 July 1989, Application No. 14038/88, ECHR Series A, No. 161, para. 103; *Dudgeon v. the United Kingdom*, 22 October 1981, Application No. 7275/76, ECHR Series A, No. 45, para. 60; *Demir and Baykara v. Turkey*, 12 November 2008, Application No. 34503/97, ECHR 2008, para. 48; however, by way of contrast, compare with *Mamatkulov and Askarov v. Turkey* [GC], Application No. 46827/99, ECHR 2005-I, para. 146; *Cruz Varas and others v. Sweden*, 20 March 1991, Application No. 15576/89, ECHR Series A, No. 201, para. 100.

[30] See footnote 29; see further *Marckx v. Belgium*, 13 June 1979, Application No. 6833/74, ECHR Series A, No. 31, para. 41; *Jorgic v. Germany*, 12 July 2007, Application No. 74613/01, ECHR 2007-III, para. 69; *Mazurek v. France*, 1 February 2007, Application No. 34406/97, ECHR 2000-II, para. 52.

assuming a position regarding the interpretation of the treaty.[31] The Inter-American Court of Human Rights, while referring less to the legislative practice of States and concentrating more on broader international developments, has nevertheless on occasion used such legislative practice as a means of interpretation.[32]

(d) Law of the Sea

15. The Agreement relating to the Implementation of Part XI[33] of the United Nations Convention on the Law of the Sea provides an important example of the need to determine carefully, in the first place, whether an act or an agreement actually constitutes a subsequent agreement or a subsequent practice "regarding the interpretation" or "in application" of the treaty. The Agreement provides that it shall be interpreted with the Convention as a "single instrument" and that it shall prevail in cases of conflict.[34] The fact that only parties to the Convention can become parties to this Implementation Agreement[35] suggests that, as long as not all parties to the Convention are parties to the Agreement, it is (also) aimed at influencing the interpretation of the Convention. Therefore, although the Implementation Agreement provides for the "disapplication" of provisions of the Convention[36] and creates new institutions and arguably even formulates amendments to the United Nations Convention on the Law of the Sea, it is also a form of subsequent practice regarding the interpretation of the Convention by assuming certain positions regarding its interpretation.[37]

(e) International humanitarian law

16. Article 118 of Geneva Convention III of 1949 provides that "prisoners of war shall be released and repatriated without delay after the cessation of active hostilities." The will of a prisoner of war not to be repatriated was intentionally not declared to be relevant by the States parties in order to prevent States from

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[31] *Bankovic et al. v. Belgium and 16 Other Contracting States* (dec.) [GC], Application No. 52207/99, ECHR 2001.XII, para. 62.

[32] See, for example, *Hilaire, Constantine and Benjamin and others v. Trinidad and Tobago, Judgments (Merits, Reparations and Costs, Judgment)*, 21 June 2002, Inter-Am. Ct. H.R. Series C No. 94, para. 12.

[33] Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (United Nations, *Treaty Series*, vol. 1836, No. 31364).

[34] Ibid., article 2; annex, sect. 1, para. 17, sect. 2, para. 6, sect. 3, para. 14 and sect. 7, para. 2, each provide that the "relevant provisions of Part XI, section 4, of the Convention shall be interpreted and applied in accordance with this Agreement".

[35] Ibid., see article 4, para. 2.

[36] Ibid., see, for example, annex, sect. 2, para. 3.

[37] In contrast, the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (United Nations, *Treaty Series*, vol. 2167, No. 37924), is open for signature by States which are not parties to the United Nations Convention on the Law of the Sea, article 1, paragraph 2, and provides in article 4, that "nothing in this Agreement shall prejudice the rights, jurisdiction and duties of States under the Convention". The Fish Stocks Agreement has, however, also been read as specifying the general obligations to cooperate which are set out in article 63, para. 2 and articles 64 and 117, of the United Nations Convention on the Law of the Sea. C. Warbrick, D. McGoldrick and D. H. Anderson, "The Straddling Stocks Agreement of 1995: an initial assessment", *International and Comparative Law Quarterly*, vol. 45, No. 2 (1996), p. 468.

abusively invoking the will of prisoners of war in order to delay repatriation.[38] In its practice, however, the International Committee of the Red Cross (ICRC) has always insisted as a condition for its participation that the will of a prisoner of war not to be repatriated be respected.[39] This practice does not necessarily mean, however, that article 118 should be interpreted as demanding that the repatriation of a prisoner of war must not happen against his or her will. The ICRC Study on customary international humanitarian law carefully notes in its commentary on rule 128 A:

> According to the Fourth Geneva Convention, no protected person may be transferred to a country 'where he or she may have reason to fear persecution for his or her political opinions or religious beliefs' (Art. 45 para. 4 Geneva Convention IV). While the Third Geneva Convention does not contain a similar clause, practice since 1949 has developed to the effect that in every repatriation in which ICRC has played the role of neutral intermediary, the parties to the conflict, whether international or non-international, have accepted the ICRC conditions for participation, including ICRC being able to check prior to repatriation (or release in case of a non-international armed conflict), through an interview in private with the persons involved, whether they wish to be repatriated (or released)."[40]

17. This formulation suggests that the practice of respecting the will of the prisoner of war is limited to cases in which ICRC is involved and in which the organization has formulated such a condition. States have drawn different conclusions from this practice of ICRC.[41] The 2004 United Kingdom Manual provides that:

> A more contentious issue is whether prisoners of war *must* be repatriated even against their will. Recent practice of States indicates that they should not. It is United Kingdom policy that prisoners of war should not be repatriated against their will.[42]

18. This particular combination of the words "must" and "should" indicates that, like ICRC, the United Kingdom is not firmly basing its policy on the view that

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[38] C. Shields Delessert, *Release and Repatriation of Prisoners of War at the End of Active Hostilities* (Schulthess, 1977), pp. 145-156 and pp. 171-175; see in general on the duty to repatriate, S. Krähenmann, "Protection of prisoners in armed conflict", *in The Handbook of International Humanitarian Law*, 3rd ed. D. Fleck, ed. (Oxford, Oxford University Press, 2013), pp. 409-410.

[39] Thus, by its involvement, the International Committee of the Red Cross tries to reconcile the interests in speedy repatriation and the respect of the will of prisoners of war (see Krähenmann, "Protection of prisoners in armed conflict", pp. 409-410).

[40] J.-M. Henckaerts and L. Doswald-Beck, eds., *Customary International Humanitarian Law*, vol. 1, *Rules* (Cambridge, International Committee of the Red Cross and Cambridge University Press, 2005), p. 455.

[41] J.-M. Henckaerts and L. Doswald-Beck, eds., *Customary International Humanitarian Law*, vol. 2, *Practice* (Cambridge, International Committee of the Red Cross and Cambridge University Press, 2005), pp. 2893-2894, paras. 844-855 and online update for Australia, Israel, the Netherlands and Spain, available from www.icrc.org/customary-ihl/eng/docs/v2_rul_rule128_sectiond.

[42] United Kingdom of Great Britain and Northern Ireland, Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford, Oxford University Press, 2004), pp. 205-206, para. 8.170 (emphasis in original).

subsequent practice suggests, namely, that the declared will of the prisoner of war must always be respected.[43]

4. Conclusion

19. The examples from the case law and State practice substantiate the need to identify and interpret carefully subsequent agreements and subsequent practice, in particular to ask whether the parties, by an agreement or a practice, assume a position regarding the interpretation of a treaty, or whether they are motivated by other considerations. This is particularly necessary in the case of so-called memoranda of understanding.[44] Ultimately, the stated or discernable purpose of any agreement of the parties is decisive.[45] The preceding considerations suggest the following conclusion:

Draft conclusion 6
Identification of subsequent agreements and subsequent practice

The identification of subsequent agreements and subsequent practice under article 31 (3) and article 32 requires careful consideration, in particular of whether the parties, by an agreement or a practice, assume a position regarding the interpretation of a treaty, or whether they are motivated by other considerations.

III. Possible effects of subsequent agreements and subsequent practice in interpretation

20. Subsequent agreements and subsequent practice, like all means of interpretation, may have different effects on the interpretation of a treaty in a particular case, that is, in the interactive process, which consists of placing appropriate emphasis on the various means of interpretation in a "single combined operation".[46] The taking into account of subsequent agreements and subsequent practice under articles 31 (3) and 32 may thus contribute to a clarification of the meaning of a treaty[47] in the sense of a specification (narrowing down) of different possible meanings of a particular term or provision, or the scope of the treaty as a

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[43] The United States manual mentions only the will of prisoners of war who are sick or wounded, see Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, vol. 2, *Practice*, pp. 2893-2894, paras. 844-855; but United States practice after the Second Gulf War was to have the International Committee of the Red Cross establish the prisoner's will and to act accordingly (United States of America, Department of Defense, *Conduct of the Persian Gulf War: Final Report to Congress* (United States Government Printing Office, 1992), pp. 707-708, available from www.dod.mil/pubs/foi/operation_and_plans/PersianGulfWar/404.pdf).

[44] See below at chap. V. 4.

[45] See also L. Crema, "Subsequent agreements and subsequent practice within and outside the Vienna Convention", in *Treaties and Subsequent Practice*, G. Nolte, ed. (Oxford University Press, 2013), pp. 25-26.

[46] Commentary to draft conclusion 1, para. 5 (A/68/10, chap IV.C.2, paras. 12-15.

[47] The terminology follows guideline 1.2 (Definition of interpretative declarations) of the Commission's Guide to Practice on Reservations to Treaties: "Interpretative declaration" means a unilateral statement, whereby ... [a State or an international organization] purports to specify or clarify the meaning or scope of a treaty or of certain of its provisions) (see A/66/10/Add.1, chap. IV. F.2, guideline 1.2); see also ibid., commentary to guideline 1.2, para. 18.

whole (1. and 2. a)), or to a clarification in the sense of confirming a wider interpretation or a certain scope for the exercise of discretion by the parties (broad understanding) (1 and 2 b)). The specificity of a subsequent practice is often an important factor for its value as a means of interpretation in a particular case, depending on the treaty in question (3).

1. Case law of the International Court of Justice

21. International courts and tribunals usually begin their reasoning in a given case by determining the "ordinary meaning" of the terms of the treaty.[48] Subsequent agreements and subsequent practice mostly enter their reasoning at a later stage when courts ask the question whether such conduct confirms or modifies the preliminary result arrived at by the initial textual interpretation (or by other means of interpretation).[49] If the parties do not wish to convey the ordinary meaning of a term, but rather a special meaning in the sense of article 31 (4), subsequent agreements and subsequent practice may contribute to bringing this special meaning to light. The following examples, mainly from the jurisprudence of the International Court of Justice,[50] illustrate how subsequent agreements and subsequent practice, as means of interpretation, can contribute, by their interaction with other means in the process of interpretation, to the clarification of the meaning of a treaty.

(a) "Ordinary meaning" of a term

22. The taking into account of subsequent agreements and subsequent practice can contribute to the identification of the "ordinary meaning" of a particular term in the sense of confirming a narrow interpretation of different possible shades of meaning of this term. This was the case, for example,[51] in the *Nuclear Weapons Advisory Opinion* where the International Court of Justice determined that the expressions "poison or poisonous weapons"

> "have been understood, in the practice of States, in their ordinary sense as covering weapons whose prime, or even exclusive, effect is to poison or

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[48] Commentary to draft conclusion 1, para. 5, p. 18, para. 14 (A/68/10, chap. IV.2, para. 14); *Competence of Assembly regarding Admission to the United Nations, Advisory Opinion, I.C.J. Reports 1950*, p. 4, at p. 8.

[49] See, for example, *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002*, p. 625, at p. 656, paras. 59-61 and p. 665, para. 80; *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 6, at p. 34, paras. 66-71; *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009*, p. 213, at p. 290 (Declaration of Judge ad hoc Guillaume).

[50] A review of the jurisprudence of other international courts and tribunals leads to the same result and more examples, see "Second report of the ILC Study Group on Treaties over Time: jurisprudence under special regimes relating to subsequent agreements and subsequent practice", in *Treaties and Subsequent Practice*, G. Nolte, ed. (Oxford, Oxford University Press, 2013), pp. 210-306.

[51] See also *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 803, at p. 815, para. 30; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 275, at p. 306, para. 67; *Competence of Assembly regarding Admission to the United Nations, Advisory Opinion, I.C.J. Reports 1950*, p. 4, at p. 9.

asphyxiate. This practice is clear, and the parties to those instruments have not treated them as referring to nuclear weapons."[52]

23. On the other hand, there are also cases where variation of subsequent practice has contributed to prevent a specification of the meaning of a general term according to one or the other of different possible meanings.[53] This was confirmed, for example, in the case of *U.S. Nationals in Morocco* where the Court stated:

> The general impression created by an examination of the relevant materials is that those responsible for the administration of the customs ... have made use of all the various elements of valuation available to them, though perhaps not always in a consistent manner. In these circumstances, the Court is of the opinion that Article 95 lays down no strict rule on the point in dispute. It requires an interpretation which is more flexible than either of those which are respectively contended for by the parties in this case.[54]

24. It is, of course, possible that different forms of practice contribute to both a narrow and a broad interpretation of different terms in the same treaty and in the same judicial procedure. A well-known example is the interpretation by the International Court of Justice in the *Certain Expenses Opinion* of the terms "expenses" (broad) and "action" (narrow) in the light of the respective subsequent practice of the organization.[55]

(b) "Terms in their context"

25. A treaty shall be interpreted in accordance with the ordinary meaning to be given to the "terms of the treaty in their context" (article 31 (1)). Subsequent agreements and subsequent practice may also, in interaction with this particular means of interpretation, contribute to identifying a narrower or broader interpretation of a term of a treaty.[56] In the Intergovernmental Maritime Consultative Organization (*IMCO) Advisory Opinion*, for example, the International Court of Justice had to determine the meaning of the expression "eight ... largest ship-owning nations" under article 28 (a) of the Convention on the International Maritime Organization (IMCO Convention). Since this concept of "largest ship-owning nations" permitted different interpretations (determination by "registered tonnage" or by "property of nationals"), and since there was no pertinent practice of the organization or its members under article 28 (a) itself, the Court turned to other provisions in the Convention and held:

> This reliance upon registered tonnage in giving effect to different provisions of the Convention ... persuade[s] the Court to view that it is unlikely that when the latter article [Article 28 (a)] was drafted and incorporated into the

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[52] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 248, para. 55.

[53] *Reservations to the Convention on Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 15, at p. 25.

[54] *Case concerning Rights of Nationals of the United States of America in Morocco, Judgment of August 27th, 1952, I.C.J. Reports 1952*, p. 176, at p. 211.

[55] *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962: I.C.J. Reports 1962*, p. 151, at pp. 158-161 ("expenses") and pp. 164-165 ("action").

[56] See, for example, *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 69, at p. 87, para. 40.

> Convention it was contemplated that any criterion other than registered tonnage should determine which were the largest shipping owning nations.[57]

26. More recently, the International Tribunal on the Law of the Sea Sea Bed Disputes Chamber has similarly used the "best environmental practices" under the "Sulphides Regulation" in order to interpret the previously adopted "Nodules Regulation".[58]

(c) "Object and Purpose"

27. Together with the text and the context, article 31 (1) accords the "object and purpose" of a treaty an importance, but not an overriding importance, for its interpretation.[59] Subsequent agreements and subsequent practice may also contribute to a clarification of the object and purpose of a treaty itself,[60] or reconcile invocations of the "object and purpose" of a treaty with other means of interpretation:

28. In the *Maritime Delimitation in the Area between Greenland and Jan Mayen*[61] and *Oil Platforms* cases,[62] for example, the International Court of Justice clarified the object and purpose of bilateral treaties by referring to subsequent practice of the parties. In the *Land and Maritime Boundary between Cameroon and Nigeria* case, the Court held:

> From the treaty texts and the practice analysed at paragraphs 64 and 65 above, it emerges that the Lake Chad Basin Commission is an international organization exercising its powers within a specific geographical area; that it does not, however, have as its purpose the settlement at a regional level of matters relating to the maintenance of international peace and security and thus does not fall under Chapter VIII of the Charter.[63]

29. When the "object and purpose" of a treaty appears to be in tension with specific purposes of certain of its rules, subsequent practice can help reduce

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[57] *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, Advisory Opinion of 8 June 1960: I.C.J. Reports 1960*, p. 150, at p. 169; see also pp. 167-169; obiter: *Proceedings pursuant to the OSPAR Convention (Ireland-United Kingdom), Reports of International Arbitral Awards*, vol. XXIII, p. 59, at p. 99, para. 141.

[58] *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Advisory Opinion, ITLOS Reports 2011*, paras. 136-137; see also Boisson de Chazournes, "Subsequent practice, practices, and 'family resemblance': towards embedding subsequent practice in its operative milieu", p. 66 (see footnote 16 above).

[59] Gardiner, *Treaty Interpretation*, pp. 190 and 198 (see footnote 10 above).

[60] Ibid., pp. 191-194; see also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16, at p. 31, para. 53; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at p. 179, para. 109; R. Higgins, "Some observations on the inter-temporal rule in international law", in *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski*, J. Makarczyk, ed. (The Hague, Kluwer, 1996), p. 180; Distefano, "La pratique subséquente des États parties à un traité", pp. 52-54 (see footnote 10 above); Crema, "Subsequent agreements and subsequent practice within and outside the Vienna Convention", p. 21 (see footnote 44 above).

[61] *Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993*, p. 38, at p. 51, para. 27.

[62] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 803, at p. 815, paras. 27 and 30.

[63] See also *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 275, at p. 306, para. 67.

possible conflicts.[64] In the *Kasikili/Sedudu Island* case, for example, the Court emphasized that the parties to the 1890 Treaty "sought both to secure for themselves freedom of navigation on the river and to delimit as precisely as possible their respective spheres of influence"[65] and thereby reconciled a possible tension by taking into account a certain subsequent practice as a subsidiary means of interpretation (under article 32).

2. State practice

30. State practice outside of judicial or quasi-judicial contexts confirms that subsequent agreements and subsequent practice can contribute to clarifying the meaning of a treaty by either narrowing the range of conceivable interpretations or by indicating a certain margin of discretion which a treaty grants to States.

(a) Narrowing the range of conceivable interpretations

31. Whereas the terms of article 5 of the 1944 Chicago Convention do not appear to require a charter flight to obtain permission to land while en route, long-standing State practice requiring such permission has led to general acceptance that this provision is to be interpreted as requiring permission.[66]

32. The term "feasible precautions" in article 57 of the Additional Protocol to the Geneva Conventions of 1949 (Protocol I) of 1977 has been circumscribed in article 3 (4) of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II) of 10 October 1980, which provides that "[f]easible precautions are those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations." This specification has come to be accepted by way of subsequent practice in many military manuals as a general definition of "feasibility" for the purpose of article 57 of Protocol I of 1977.[67]

33. Finally, article 22 (3) of the Vienna Convention on Consular Relations provides that the means of transport of a mission shall be immune from search, requisition, attachment or execution. While certain forms of police enforcement will

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[64] See World Trade Organization, *United States — Import Prohibition of Certain Shrimp and Shrimp Products — AB-1998-4*, report of the Appellate Body of 12 October 1998 (World Trade Organization, document WT/DS58/AB/R), para. 17 ("most treaties have no single, undiluted object and purpose but rather a variety of different, and possibly conflicting, objects and purposes"); Gardiner, *Treaty Interpretation*, p. 195 (see footnote 10 above).

[65] *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999*, p. 1045, at p. 1074, para. 45.

[66] S. D. Murphy, "The relevance of subsequent agreement and subsequent practice for the interpretation of treaties", in *Treaties and Subsequent Practice*, G. Nolte, ed. (Oxford, Oxford University Press, 2013), p. 85; A. Aust, *Modern Treaty Law and Practice*, 3rd ed. (Cambridge, Cambridge University Press, 2013), p. 215.

[67] For the military manuals of Argentina (1989), Canada (2001) and the United Kingdom (2004), see Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, vol. 2, *Practice*, pp. 359-360, paras. 160-164 (see footnote 40 above) and the online update for the military manual of Australia (2006) (http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule15_sectionc); see also Y. Sandoz, C. Swinarski and B. Zimmermann, eds., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Dordrecht, International Committee of the Red Cross and Martinus Nijhoff, 1987), p. 683, para. 2202.

usually be met with protests of States,[68] the towing of diplomatic cars has been found permissible in practice.[69] This practice suggests that, while punitive measures against diplomatic vehicles are forbidden, cars can be stopped or removed if they prove to be an immediate danger or obstacle for traffic and/or public safety.[70] In that sense, the meaning of the term "execution", and thus, the scope of protection accorded to means of transportation, is specified by the subsequent practice of parties.

34. Thus, subsequent agreements and subsequent practice can contribute to specifying the meaning of a term in the sense of narrowing the possible meanings of the rights and obligations under a treaty.

(b) Widening the range of conceivable interpretation or supporting a certain scope for the exercise of discretion

35. Such agreements or practice can, however, also indicate a wide range of acceptable interpretation or a certain scope for the exercise of discretion which a treaty grants to States:[71]

> Article 12 of the Additional Protocol to the Geneva Conventions of 1949 (Protocol II) of 1977 provides:
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> > Under the direction of the competent authority concerned, the distinctive emblem of the Red Cross, Red Crescent or Red Lion and Sun on a white

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[68] E. Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations*, Oxford Commentaries on International Law, 3rd ed. (Oxford, Oxford University Press, 2008), pp. 160-161; J. Salmon, *Manuel de droit diplomatique* (Brussels, Bruylant, 1994), p. 208, para. 315; see also the protest by the British authorities after a British Air Attaché and the Canadian Armed Forces Attaché were removed from a car belonging to the British Embassy (see G. Marston, "United Kingdom materials on international law 1981", *British Yearbook of International Law*, vol. 52, No. 1 (1981), p. 434).

[69] See, for example, Australia, Department of Foreign Affairs and Trade, *Privileges and Immunities of Foreign Representatives* (www.dfat.gov.au/protocol/Protocol_Guidelines/A21.pdf); Iceland, Protocol Department Ministry of Foreign Affairs, *Diplomatic Handbook*, p. 14 (www.mfa.is/media/PDF/Diplomatic_Handbook.PDF); United Kingdom, see the statement of the Parliamentary Under-Secretary of State, Home Office (Lord Elton) in the House of Lords (HL Deb, 12 December 1983 vol. 446 cc3-4; United States, see *American Journal of International Law*, vol. ii, 1994, pp. 312-313.

[70] Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations*, p. 160 (see footnote 68 above); M. Richtsteig, *Wiener Übereinkommen über diplomatische und konsularische Beziehungen: Entstehungsgeschichte, Kommentierung, Praxis*, 2nd ed. (Nomos, 2010), p. 70.

[71] This is not to suggest that there may exist different possible interpretations of a treaty, but rather that the treaty may accord the parties the possibility to choose from a spectrum of different permitted acts, see Gardiner, *Treaty Interpretation*, pp. 30-31 and p. 111 (see footnote 10 above), quoting the House of Lords in *R v Secretary of State for the Home Department, ex parte Adan* [2001] AC 477: "It is necessary to determine the autonomous meaning of the relevant treaty provision ... It follows that, as in the case of other multilateral treaties, the Refugee Convention must be given an independent meaning derivable from the sources mentioned in articles 31 and 32 [of the Vienna Convention] and without taking colour from distinctive features of the legal system of any individual contracting State. In principle there can only be one true interpretation of a treaty ... In practice it is left to national courts, faced with a material disagreement on an issue of interpretation, to resolve it. But in doing so it must search, untrammeled by notions of its national legal culture, for the true autonomous international meaning of the treaty. And there can only be one true meaning", at pp. 515-517 (Lord Steyn).

> ground shall be displayed by medical and religious personnel and medical units, and on medical transports. It shall be respected in all circumstances. It shall not be used improperly.

36. Although the term "shall" suggests that it is obligatory for States to use the distinctive emblem for marking medical personnel and transports, subsequent practice suggests that States possess a certain discretion in this regard.[72] As armed groups have in recent years specifically attacked medical convoys which were well recognizable due to the protective emblem, States have in certain situations refrained from marking such convoys with a distinctive emblem. Responding to a parliamentary question on its practice in Afghanistan, the Government of Germany has stated that:

> As other contributors of ISAF contingents, the Federal Armed Forces have experienced that marked medical vehicles have been targeted. Occasionally, these medical units and vehicles, clearly distinguished as such by their protective emblem, have even been preferred as targets. The Federal Armed Forces have thus, alongside with Belgium, France, the UK, Canada and the US, decided within ISAF to cover-up the protective emblem on medical vehicles.[73]

37. Such practice by States confirms an interpretation according to which article 12 does not contain an obligation to use the protective emblem in all circumstances,[74] and thereby indicates a margin of discretion for the parties.

38. A treaty provision granting States a certain scope for the exercise of discretion can raise the question whether this scope is limited by the purpose of the rule. According to article 9 of the Vienna Convention on Diplomatic Relations, the receiving State may notify the sending State, without having to give reasons, that a member of the mission is persona non grata. States typically issue such notifications in cases in which members of the mission were found or suspected of having engaged in espionage activities, or having committed other serious violations of the law of the receiving State, or caused significant political irritation.[75] However, many States also make such declarations in more mundane circumstances, for example to enforce their impaired driving policy,[76] or when envoys caused serious

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[72] Sandoz, Swinarski and Zimmermann, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, p. 1440, paras. 4742-4744 (see footnote 67 above); H. Spieker, "Medical transportation", in *Max Planck Encyclopedia of Public International Law* (www.mpepil.com), paras. 7-12; see also the less stringent future tense in the French version "sera arboré".

[73] Deutscher Bundestag, "Antwort der Bundesregierung: Rechtlicher Status des Sanitätspersonals der Bundeswehr in Afghanistan", 9 April 2010, Bundestagsdrucksache 17/1338, p. 2 (translation by the Special Rapporteur).

[74] Spieker, "Medical transportation", para. 12.

[75] See Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations*, pp. 77-88 (see footnote 68 above) with further references to declarations in relation to espionage; see also Salmon, *Manuel de droit diplomatique*, p. 484 para. 630 (see footnote 68 above); and Richtsteig, *Wiener Übereinkommen über diplomatische und konsularische Beziehungen*, p. 30 (see footnote 70 above).

[76] See Canada, Foreign Affairs, Trade and Development, Revised Impaired Driving Policy (www.international.gc.ca/protocol-protocole/vienna-vienne/idp/index.aspx?view=d); United States, Department of State, *Diplomatic Note 10-181 of the Department of State* (24 September 2010), www.state.gov/documents/organization/149985.pdf, pp. 8-9.

injury to a third party,[77] or committed serious or repeated infringement of the law.[78] It is even conceivable that declarations are made without clear reasons for political motives. Other States do not seem to have asserted that such practice constitutes an abuse of the power to declare members of a mission as personae non gratae for purposes unrelated to political or other more serious concerns. Thus, such practice suggests that article 9 provides a very broad scope for the exercise of discretion.[79]

3. Specificity of practice

39. The interpretative value of subsequent practice in relation to other means of interpretation in a particular case often depends on its specificity in relation to the treaty concerned.[80] This is confirmed, for example, by decisions of the International Court of Justice, arbitral awards and reports of the World Trade Organization (WTO) Panel and Appellate Body.[81] The award of the International Centre for Settlement of Investment Disputes (ICSID) tribunal in *Plama* v. *Bulgaria* is instructive:

> It is true that treaties between one of the Contracting Parties and third States may be taken into account for the purpose of clarifying the meaning of a treaty's text at the time it was entered into. The Claimant has provided a very clear and insightful presentation of Bulgaria's practice in relation to the conclusion of investment treaties subsequent to the conclusion of the Bulgaria-Cyprus BIT in 1987. In the 1990s, after Bulgaria's communist regime changed, it began concluding BITs with much more liberal dispute resolution provisions, including resort to ICSID arbitration. However, that practice is not particularly relevant in the present case since subsequent negotiations between Bulgaria and Cyprus indicate that these Contracting Parties did not intend the

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[77] The Netherlands, Protocol Department, Ministry of Foreign Affairs, Protocol Guide for Diplomatic Missions and Consular Posts. Available from www.government.nl/issues/staff-of-foreign-missions-and-international-organisations/documents-and-publications/leaflets/2013/01/21/protocol-guide-for-diplomatic-missions-en-consular-posts-january-2013.html.

[78] France, Ministère des affaires étrangères et du développement, Guide for foreign diplomats serving in France: Immunities — Respect for local laws and regulations (www.diplomatie.gouv.fr/en/ministry/guide-for-foreign-diplomats/immunities/article/respect-for-local-laws-and); Turkey, Ministry of Foreign Affairs, Traffic regulations to be followed by foreign missions in Turkey, Principal Circular Note, 63552 Traffic Regulations 2005/PDGY/63552 (6 April 2005) (http://www.mfa.gov.tr/06_04_2005--63552-traffic-regulations.en.mfa); United Kingdom, Foreign and Commonwealth Office, Circular dated 19 April 1985 to the Heads of Diplomatic Missions in London, reprinted in G. Marston, "United Kingdom materials on international law 1985", *British Yearbook of International Law*, vol. 56, No. 1 (1985), p. 437.

[79] See G. Hafner, "Subsequent agreements and practice: between interpretation, informal modification, and formal amendment", in *Treaties and Subsequent Practice*, G. Nolte, ed. (Oxford, Oxford University Press, 2013), p. 112 for an even more far-reaching case under article 9 of the Vienna Convention on Diplomatic Relations.

[80] Murphy, "The relevance of subsequent agreement and subsequent practice for the interpretation of treaties", p. 91 (see footnote 66 above).

[81] See, for example, *Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993*, p. 38, at p. 55, para. 38; *Question of the tax regime governing pensions paid to retired UNESCO officials residing in France*, Decision of 14 January 2003, *Reports of International Arbitral Awards*, vol. XXV, part IV, p. 231, at p. 259, para. 74; WTO, Panel Report, *US — Continued Zeroing*, WT/DS350/R, 1 October 2008 WTO, Appellate Body Report, *US — Upland Cotton*, WT/DS267/AB/R, 3 March 2005, para. 625.

> MFN provision to have the meaning that otherwise might be inferred from Bulgaria's subsequent treaty practice. Bulgaria and Cyprus negotiated a revision of their BIT in 1998. The negotiations failed but specifically contemplated a revision of the dispute settlement provisions (...). It can be inferred from these negotiations that the Contracting Parties to the BIT themselves did not consider that the MFN provision extends to dispute settlement provisions in other BITs.[82]

40. While the International Court of Justice and arbitral tribunals tend to accord more interpretative value to rather specific subsequent practice by States, the European Court of Human Rights mostly limits itself to broad and sometimes rough comparative assessments of the domestic legislation or international positions adopted by States.[83] In this context, it must be borne in mind that the rights which are articulated in human rights treaties are usually not designed to be authoritatively interpreted and applied by State organs, but they must rather correctly translate (within the given margin of appreciation) the treaty obligations into the law, the executive practice and international arrangements of their respective State. For this purpose, sufficiently strong commonalities in the national legislations of a significant number of member States can already be relevant for the determination of the scope of a human right or the necessity of its restriction. In addition, the character of certain rights sometimes speaks in favour of taking less specific practice into account. For example, in the case of *Rantsev* v. *Cyprus* the Court held that:

> it is clear from the provisions of these two <international> instruments that the Contracting States ... have formed the view that only a combination of measures addressing all three aspects can be effective in the fight against trafficking (...). Accordingly, the duty to penalise and prosecute trafficking is only one aspect of member States' general undertaking to combat trafficking. The extent of the positive obligations arising under Article 4 <prohibition of forced labour> must be considered within this broader context.[84]

41. Similarly, in the case of *Chapman v. the United Kingdom* the Court observed "that there may be said to be an emerging international consensus amongst the Contracting States of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle (...),"[85] but ultimately said that it was "not persuaded that the consensus is sufficiently

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[82] *Plama Consortium Limited v. Republic of Bulgaria* (Cyprus/Bulgaria BIT), Decision on Jurisdiction, ICSID Case No. ARB/03/24 (ECT) (8 February 2005), *ICSID Review — Foreign Investment Law Journal*, vol. 20 (2005), p. 262, at pp. 323-324, para. 195.

[83] See, for example, *Cossey v. the United Kingdom*, 27 September 1990, Application No. 10843/84, ECHR Series A, No. 184, para. 40; *Tyrer v. the United Kingdom*, 25 April 1978, Application No. 5856/72, ECHR Series A, No. 26, para. 31; *Norris v. Ireland*, 26 October 1988, Application No. 10581/83, ECHR Series A, No. 142, para. 46. This has been criticized by commentators: see, for example, P. G. Carozza, "Uses and misuses of comparative law in international human rights: some reflections on the jurisprudence of the European Court of Human Rights", *Notre Dame Law Review*, vol. 73, No. 5 (1998), pp. 1223-1224; L. R. Helfer, "Consensus, coherence and the European Convention on Human Rights", *Cornell International Law Journal*, vol. 26, 1993, p. 140.

[84] *Rantsev v. Cyprus and Russia*, 7 January 2010, Application No. 25965/04, ECHR 2010, paras. 273-274 and 285.

[85] *Chapman v. the United Kingdom* [GC], 18 January 2001, Application No. 27238/95, ECHR 2001-I, para. 93.

concrete for it to derive any guidance as to the conduct or standards which Contracting States consider desirable in any particular situation."[86]

The preceding considerations suggest the following conclusion:

Draft conclusion 7
Possible effects of subsequent agreements and subsequent practice in interpretation

1. Subsequent agreements and subsequent practice under articles 31 (3) and 32 can contribute to the clarification of the meaning of a treaty, in particular by narrowing or widening the range of possible interpretations, or by indicating a certain scope for the exercise of discretion which the treaty accords to the parties.

2. The value of a subsequent agreement or subsequent practice as a means of interpretation may, inter alia, depend on their specificity.

IV. Form and value of subsequent practice under article 31 (3) (b)

42. The Commission has recognized that subsequent practice under article 31 (3) (b) consists of any "conduct" in the application of a treaty which may contribute to establishing an agreement regarding the interpretation of the treaty.[87] Depending on the treaty concerned, this includes not only externally oriented conduct, such as official acts, statements and voting at the international level, but also internal legislative, executive and judicial acts, as well as practices by non-state entities which fall within the scope of what the treaty conceives as forms of its application.[88] The individual conduct which may contribute to a subsequent practice under article 31 (3) (b) must not meet any particular formal criteria.[89] This does not, however, answer the question whether the collective "subsequent practice which establishes the agreement of the parties" under article 31 (3) (b) requires a particular form.

1. Variety of possible forms of subsequent practice under article 31 (3) (b)

43. It is clear that subsequent practice by all parties can establish their agreement regarding the interpretation of a treaty. Such practice need not necessarily be joint conduct.[90] A merely parallel conduct may suffice. This can be the case, for example,

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[86] Ibid., para. 94.

[87] Commentary to draft conclusion 4, paras. 16-19 (A/68/10, chap. IV, sect. C.2).

[88] See, for example, draft conclusion 5 (A/68/10, chap. IV, sect. C.1 and sect. C.2); *Maritime Dispute (Peru v. Chile), I.C.J., Judgment of 27 January 2014*, pp. 39-42, paras. 103-111 and pp. 45-46, paras. 119-122 and p. 47, para. 126; Gardiner, *Treaty Interpretation*, pp. 228-230 (see footnote 10 above); Dörr, "Article 31. General rule of interpretation", pp. 555-556, para. 78 (see footnote 11 above); Boisson de Chazournes, "Subsequent practice, practices, and 'family resemblance': towards embedding subsequent practice in its operative milieu", pp. 54, 56 and 59-60 (see footnote 16 above).

[89] Gardiner, *Treaty Interpretation*, pp. 226-227; Boisson de Chazournes, "Subsequent practice, practices, and 'family resemblance': towards embedding subsequent practice in its operative milieu", p. 53.

[90] *Case concerning the Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, p. 6, at p. 33; *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999*, p. 1045, at p. 1213, para. 17 (Dissenting Opinion of Judge Parra-Aranguren).

when two States grant oil concessions independently from each other in a way which suggests that they thereby implicitly recognize a certain course of a boundary in a maritime area. Thus, in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria*, the International Court of Justice stated that oil concessions "may ... be taken into account" if they are "based on express or tacit agreement between the parties".[91] It is a separate question whether parallel activity of such a kind actually articulates a sufficient common understanding (agreement) regarding the interpretation of a treaty in a particular case (see chap. V below).[92]

2. Density and uniformity of subsequent practice

44. The Commission indicated that "if ... the concept of subsequent practice ... is distinguished from a possible agreement between the parties, frequency is not a necessary element of the definition of the concept of 'subsequent practice' ... under article 32".[93] This does not answer the question whether "subsequent practice" under article 31 (3) (b)[94] requires more than a one-time application of the treaty as a possible basis for an agreement of the parties regarding its interpretation. The WTO Appellate Body has asserted a rather demanding standard in this respect by stating in its early decision *Japan — Alcoholic Beverages II* that:

> Subsequent practice in interpreting a treaty has been recognized as a 'concordant, common and consistent' sequence of acts or pronouncements which is sufficient to establish a discernable pattern implying the agreement of the parties regarding its interpretation.[95]

45. This definition suggests that subsequent practice under article 31 (3) (b) requires more than one "act or pronouncement" regarding the interpretation of a treaty, but rather action of such frequency and uniformity as to warrant the conclusion that the parties are in a repeatedly confirmed settled agreement over the interpretation of the treaty. This is a rather high threshold which would imply that subsequent practice under article 31 (3) (b) does not simply refer to subsequent practice as a means of identifying any agreement, but that it rather requires a particularly broad-based, settled, and qualified form of collective practice in order to establish agreement between the parties regarding interpretation.

46. The International Court of Justice, on the other hand, has not formulated such an abstract definition of subsequent practice as a collective activity under article 31 (3) (b). The Court has rather applied this provision flexibly, without adding any further conditions. This is true, in particular, for its judgment in the leading case of *Kasikili/Sedudu Island*, in which the Court reaffirmed its previous

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[91] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 303, at p. 447, para. 304.

[92] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007*, p. 659, at p. 737, para. 258; but see *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 18, at p. 84, para. 117 where the Court recognized concessions granted by the parties to the dispute as evidence of their tacit agreement; see also *Maritime Dispute (Peru* v. *Chile), I.C.J., Judgment of 27 January 2014*.

[93] Commentary to draft conclusion 4, para. 35 (A/68/10, chap. IV.C.2).

[94] Draft conclusion 4, para. 2 (A/68/10, chap. IV.C.1).

[95] WTO, Appellate Body Report, *Japan — Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 4 October 1996, sect. E, pp. 12-13.

relevant case law.[96] Other international courts have mostly followed the International Court of Justice in its flexible understanding of the threshold for the application of article 31 (3) (b). This is true for the Iran-United States Claims Tribunal[97] and the European Court of Human Rights,[98] whereas the International Tribunal for the Law of the Sea[99] and the European Court of Justice[100] have at least not adopted the standard which the WTO Appellate Body formulated in *Japan — Alcoholic Beverages II*. ICSID tribunals have rendered divergent awards.[101]

47. Upon closer inspection, the difference between the standard formulated by the WTO Appellate Body and individual ICSID awards, on the one hand, and the approach of the International Court of Justice and other international tribunals on the other, is more apparent than real. The WTO Appellate Body seems to have taken the "concordant, common and consistent" formula from a publication by Sir Ian Sinclair[102] who himself drew on a similar formulation in French by Mustafa Kamil Yasseen, a former member of the Commission.[103] Sinclair, however, did not make the categorical statement that subsequent practice, in order to fulfil the requirements

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[96] *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999*, p. 1045, at pp. 1075-1076, paras. 47-50 and p. 1087, para. 63; *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 6, at pp. 34-37, paras. 66-71.

[97] Iran-United States Claims Tribunal, Interlocutory Award No. ITL 83-B1-FT (Counterclaim), *The Islamic Republic of Iran* v. *the United States of America*, Iran-USCTR vol. 38 (2004-2009), p. 77, at pp. 116-126, paras. 109-133.

[98] *Soering*, para. 103 (see footnote 28 above); *Loizidou* v. *Turkey (Preliminary Objections)*, 23 March 1995, Application No. 15318/89, ECHR, Series A, No. 310, paras. 73 and 79-82; *Bankovic*, paras. 56 and 62 (see footnote 30 above).

[99] *The M/V "SAIGA" (No. 2) Case (Saint Vincent and the Grenadines* v. *Guinea), Judgment, ITLOS Reports 1999*, p. 262, at paras. 155-156.

[100] *The Queen* v. *Minister of Agriculture, Fisheries and Food, ex parte S. P. Anastasiou (Pissouri) Ltd and others*, Judgment, 5 July 1994, Case C-432/92, ECR I-3087, paras. 43, 46 and 50-54; *Leonce Cayrol v. Giovanni Rivoira & Figli*, Judgment, 30 November 1977, Case C-52/77, ECR 2261, para. 18.

[101] *Enron Corporation and Ponderosa Assets, L.P.* v. *Argentine Republic* (United States/Argentina BIT), Annulment Proceeding, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award, ICSID Case No. ARB/01/3, 7 October 2008, p. 43, para. 70, available from http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC830_En&caseId=C3; *Mihaly International Corporation* v. *Democratic Socialist Republic of Sri Lanka* (United States/Sri Lanka BIT), Award and Concurring Opinion, ICSID Case No. ARB/00/2, 15 March 2002, *ICSID Review — Foreign Investment Law Journal*, vol. 17, No. 1 (2002), p. 142, at p. 151 para. 33; *National Grid plc* v. *The Argentine Republic* (UK/Argentina BIT), Decision on Jurisdiction (United Nations Commission on International Trade Law (UNCITRAL)), 20 June 2006, p. 25-26, paras. 84-85, available from http://italaw.com/documents/NationalGrid-Jurisdiction-En.pdf; O.K. Fauchald, "The legal reasoning of ICSID tribunals: an empirical analysis", *European Journal of International Law*, vol. 19, No. 2 (2008), p. 345; see also A. Roberts, "Power and persuasion in investment treaty interpretation: the dual role of States", *American Journal of International Law*, vol. 104, 2010, pp. 207-215.

[102] I. Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester, Manchester University Press, 1984), p. 137.

[103] Yasseen, "L'interprétation des traités d'après la Convention de Vienne sur le droit des traités", pp. 48-49 (see footnote 10 above); whilst "commune" is taken from the work of the International Law Commission, "d'une certaine constance" and "concordante" are conditions which Yasseen derives through further reasoning; see *Yearbook of the International Law Commission, 1966*, vol. II (United Nations publication, Sales No. E.67.V.2), pp. 98-99, paras. 17-18 and p. 221, para. 15.

of article 31 (3) (b) must be "concordant, common and consistent", but rather wrote that "the *value* [emphasis added] of subsequent practice will naturally depend on the extent to which it is con-cordant, common and consistent."[104] This suggests that the formula "concordant, common and consistent" did not originally serve to establish a formal threshold for the applicability of article 31 (3) (b), but rather provided an indication as to the circumstances under which subsequent practice under article 31 (3) (b) would have more or less value as a means of interpretation in a process of interpretation.[105] And indeed the WTO Appellate Body has itself on occasion relied, in an analogous situation, on this nuanced perspective when it held:

> The purpose of treaty interpretation is to establish the *common* [emphasis in original] intention of the parties to the treaty. To establish this intention, the prior practice of only one of the parties may be relevant, but it is clearly of more limited value than the practice of all parties.[106]

48. It is therefore suggested that the formula "concordant, common and consistent" does not establish a minimum threshold for the applicability of article 31 (3) (b). It is rather the extent to which subsequent practice is "concordant, common and consistent" that a "discernable pattern" can be identified which implies an agreement of the parties which then "must be read into the treaty".[107] Accordingly, the Commission has found that "the value of subsequent practice varies depending on how far it shows the common understanding of the parties as to the meaning of the terms."[108] The reason the WTO Appellate Body has occasionally formulated a more demanding definition may be due to the specific character and the working of the WTO agreements rather than to a considered view of the requirements of article 31 (3) (b) for a broad range of other treaties. The preceding considerations suggest the following conclusion:

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[104] I. Sinclair, *The Vienna Convention on the Law of Treaties*, p. 137; Iran-United States Claims Tribunal, Interlocutory Award No. ITL 83-B1-FT (Counterclaim), *The Islamic Republic of Iran* v. *the United States of America*, Iran-USCTR, vol. 38 (2004-2009), p. 77, at p. 118, para. 114.

[105] *Case concerning a dispute between Argentina and Chile concerning the Beagle Channel*, 18 February 1977, *Reports of International Arbitral Awards*, vol. XXI, part II, p. 53, at p. 187, para. 169; J.-P Cot, "La conduite subséquente des parties a un traité", *Revue générale de droit international public*, vol. 70, 1966, pp. 644-647 ("valeur probatoire"); Distefano, "La pratique subséquente des États parties à un traité", p. 46 (see footnote 10 above); Dörr, "Article 31. General rule of interpretation", p. 556, para. 79 (see footnote 11 above); see also the oral argument before the International Court of Justice in *Maritime Dispute (Peru* v. *Chile)*, CR 2012/33, pp. 32-36, paras. 7-19 (Wood), available from www.icj-cij.org/docket/files/137/17218.pdf and CR 2012/36, pp. 13-18, paras. 6-21 (Wordsworth), available from www.icj-cij.org/docket/files/137/17234.pdf.

[106] WTO, Appellate Body Report, *EC — Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, 5 June 1998, para. 93.

[107] *Yearbook of the International Law Commission, 1966*, vol. II (United Nations publication, Sales No. E.67.V.2), p. 221, para. 14; reaffirmed in *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999*, p. 1045, at p. 1076, para. 49; see also B. Simma, "Miscellaneous thoughts on subsequent agreements and practice", in *Treaties and Subsequent Practice*, G. Nolte, ed. (Oxford, Oxford University Press, 2013), p. 46; Gardiner, *Treaty Interpretation*, pp. 218 and 239-241 (see footnote 10 above).

[108] *Yearbook of the International Law Commission, 1966*, vol. II (United Nations publication, Sales No. E.67.V.2), p. 222, para. 15; Cot, "La conduite subséquente des parties a un traité", p. 652.

Draft conclusion 8
Forms and value of subsequent practice under article 31 (3) (b)

Subsequent practice under article 31 (3) (b) can take a variety of forms and must reflect a common understanding of the parties regarding the interpretation of a treaty. Its value as a means of interpretation depends on the extent to which it is concordant, common and consistent.

V. Agreement of the parties regarding the interpretation of a treaty

49. The element which distinguishes subsequent agreements and subsequent practice as authentic means of interpretation under article 31 (3) (a) and (b), and other subsequent practice as a supplementary means of interpretation under article 32,[109] is the "agreement" of the parties regarding the interpretation of the treaty concerned. It is the agreement of the parties which gives the means of interpretation under article 31 (3)[110] their specific function and value for the interactive process of interpretation under the general rule of interpretation of article 31.[111]

1. Existence and scope of agreement

50. Conflicting positions expressed by different parties to a treaty exclude the existence of an agreement. This has been confirmed, inter alia, by the Arbitral Tribunal in the case of *German External Debts* which held that a "tacit subsequent understanding" could not be derived from a number of communications by administering agencies since one of those agencies, the Bank of England, had expressed a divergent position.[112]

51. However, the lack of agreement reaches only as far as the divergence goes and as long as it lasts. The scope and the coming about of any agreement need to be

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[109] See draft conclusion 2 and draft conclusion 4, para. 3 (A/68/10, chap. IV.C.1).

[110] See J. Crawford, "A consensualist interpretation of article 31 (3) of the Vienna Convention on the Law of Treaties", in *Treaties and Subsequent Practice*, G. Nolte, ed. (Oxford, Oxford University Press, 2013), p. 30: "There is no reason to think that the word 'agreement' in para. (b) has any different meaning as compared to the meaning it has in para. (a)".

[111] See commentary to draft conclusion 1, paras. 12-15 (A/68/10, chap. IV.C.2); article 31 must be "read as a whole" and conceives of the process of interpretation as "a single combined operation", and is "not laying down a legal hierarchy of norms for the interpretation of treaties", *Yearbook of the International Law Commission, 1966*, vol. II (United Nations publication, Sales No. E.67.V.2), p. 219, para. 8, and p. 220, para. 9.

[112] *Case concerning the question whether the re-evaluation of the German Mark in 1961 and 1969 constitutes a case for application of the clause in article 2 (e) of Annex I A of the 1953 Agreement on German External Debts between Belgium, France, Switzerland, the United Kingdom of Great Britain and Northern Ireland and the United States of America on the one hand and the Federal Republic of Germany on the other*, Award of 16 May 1980, *Reports of International Arbitral Awards*, vol. XIX, part III, p. 67, pp. 103-104, para. 31; see also WTO, Appellate Body Report, *EC — Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, 5 June 1998, para. 95; *Case concerning the delimitation of the maritime boundary between Guinea and Guinea-Bissau*, Decision of 14 February 1985, *Reports of International Arbitral Awards*, vol. XIX, part IV, p. 149, at p. 175, para. 66; Case C-432/92, *The Queen* v. *Minister of Agriculture, Fisheries and Food, ex parte S. P. Anastasiou (Pissouri) Ltd and others*, [1994] ECR I-3087, paras. 50-51.

carefully elucidated (see II above).[113] The fact that States implement a treaty differently does not, as such, permit a conclusion about the legal relevance of this divergence. Such difference can reflect a disagreement over the (one) correct interpretation, but also a common understanding that the treaty permits a certain scope for the exercise of discretion in its implementation.[114] Treaties characterized by considerations of humanity or other general community interests, such as human rights treaties or the Refugee Convention, presumably aim at a uniform interpretation as far as they establish minimum obligations and do not leave a scope for the exercise of discretion to States.

52. Whereas equivocal conduct by one or more parties will normally prevent the identification of an agreement,[115] international courts have occasionally recognized an agreement regarding interpretation under article 31 (3) to have come about despite the existence of certain indications to the contrary. Thus, not every element of the conduct of a State which does not fully fit into a general picture necessarily has the effect of making the conduct of that State so equivocal that it precludes the identification of an agreement. The Court of Arbitration in the *Beagle Channel* case, for example, found that the fact that the parties conducted negotiations and later revealed a difference of opinion regarding the interpretation of a treaty is not necessarily sufficient to establish that this lack of agreement was permanent:

> ... In the same way, negotiations for a settlement that did not result in one, could hardly have any permanent effect. At the most they might temporarily have deprived the acts of the Parties of probative value in support of their respective interpretations of the treaty, insofar as these acts were performed during the process of the negotiations. The matter cannot be put higher than that.[116]

In the same case, the Court of Arbitration considered that:

> The mere publication of a number of maps of (as the Court has already shown) extremely dubious standing and value could not — even if they nevertheless represented the official Argentine view — preclude or foreclose Chile from engaging in acts that would, correspondingly, demonstrate her own view of what were her rights under the 1881 Treaty — nor could such publication of itself absolve Argentina from all further necessity for reaction in respect of those acts, if she considered them contrary to the treaty.[117]

53. Similarly, in *Loizidou* v. *Turkey* the European Court of Human Rights held that the scope of the restrictions which the parties could place on their acceptance of the competence of the Commission and the Court was "confirmed by the subsequent practice of the Contracting parties," that is, "the evidence of a practice denoting practically universal agreement amongst Contracting Parties that articles 25

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[113] *Maritime Dispute (Peru* v. *Chile), I.C.J., Judgment of 27 January 2014*, at p. 36, para. 99.

[114] See chap. III above.

[115] *Question of the tax regime governing pensions paid to retired UNESCO officials residing in France*, Decision of 14 January 2003, *Reports of International Arbitral Awards*, vol. XXV, part IV, p. 231, at para. 258, para. 70; R. Kolb, "La modification d'un traité par la pratique subséquente des parties", *Revue suisse de droit international et européen*, vol. 14, 2004, p. 16.

[116] *Case concerning a dispute between Argentina and Chile concerning the Beagle Channel*, 18 February 1977, *Reports of International Arbitral Awards*, vol. XXI, part II, p. 57, at p. 188, para. 171.

[117] Ibid.

and 46 ... of the Convention do not permit territorial or substantive restrictions."[118] The Court described "such a State practice" as being "uniform and consistent", despite the fact that it simultaneously recognized that two States possibly constituted exceptions.[119] This decision is noteworthy because the Court, in contrast to its usual way of reasoning, expressly invoked and applied article 31 (3) (b).[120] The decision suggests that interpreters possess some margin of appreciation when identifying whether an agreement of the parties regarding a certain interpretation is established.[121]

2. An "agreement" under article 31 (3) may be informal

54. The term "agreement" in the Vienna Convention,[122] and its use in the customary international law on treaties, does not imply a particular degree of formality.[123] Accordingly, the Vienna Convention also does not envisage any requirements of form for an "agreement" under article 31 (3) (a) and (b).[124] The Commission has, however, noted that, in order to distinguish a subsequent agreement under article 31 (3) (a) and a subsequent practice which "establishes the agreement" of the parties under article 31 (3) (b), the former presupposes a "single common act".[125] Apart from this minimal degree of formality for the particular means of interpretation under article 31 (3) (a), any identifiable agreement of the parties is sufficient. There is no requirement that such an agreement be published or registered under article 102 of the Charter of the United Nations.[126]

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[118] *Loizidou*, paras. 79 and 81 (see footnote 98 above).

[119] Ibid., paras. 80 and 82.

[120] The case did not concern the interpretation of a particular human right, but rather the question of whether a State was bound to the Convention at all.

[121] The more restrictive jurisprudence of the WTO Dispute Settlement Body suggests that different interpreters may evaluate matters differently, see WTO Appellate Body Report, *US — Continued Zeroing*, WT/DS350/AB/R, 4 February 2009, para. 7.218: "[...] even if it were established conclusively that all the 76 Members referred to by the European Communities have adopted a [certain] practice [...], this would only mean that a considerable number of WTO Members have adopted an approach different from that of the United States. [...] We note that one third party in this proceeding submitted arguments contesting the view of the European Communities."

[122] See articles 2 (1) (a), 3, 24 (2), 39-41, 58 and 60.

[123] Commentary to draft conclusion 4, para. 5 (A/68/10, chap. IV.C.2); Yasseen, "L'interprétation des traités d'après la Convention de Vienne sur le droit des traités", p. 45 (see footnote 10 above); Distefano, "La pratique subséquente des États parties à un traité", p. 47 (see footnote 10 above).

[124] Commentary to draft conclusion 4, para. 5 (A/68/10, chap. IV.C.2); Gardiner, *Treaty Interpretation*, pp. 208-209 and 216-220 (see footnote 10 above); Aust, *Modern Treaty Law and Practice*, p. 213 (see footnote 66 above); Dörr, "Article 31. General rule of interpretation", p. 554, para. 75 (see footnote 11 above).

[125] Commentary to draft conclusion 4, para. 10 (A/68/10, chap. IV.C.2); a "single common act" may also consist of an exchange of letters, see *European Molecular Biology Laboratory Arbitration (EMBL v. Germany)*, 29 June 1990, *ILR*, vol. 105, p. 1, at pp. 54-56; H. Fox, "Article 31 (3) (a) and (a) of the Vienna Convention and the *Kasikili/Sedudu Island Case*", in *Treaty Interpretation and the Vienna Convention on the Law of Treaties — 30 Years On*, M. Fitzmaurice, O. Elias and P. Merkouris, eds. (Martinus Nijhoff, 2010), p. 63; Gardiner, *Treaty Interpretation*, pp. 220-221.

[126] A. Aust, "The theory and practice of informal international instruments", *International and Comparative Law Quarterly*, vol. 35, No. 4 (1986), pp. 789-790.

3. Awareness of the parties of their agreement

55. For an agreement under article 31 (3) it is not sufficient that the positions of the parties regarding the interpretation or application of the treaty happen to overlap, but the parties must also be aware that these positions are common. Thus, in the *Kasikili/Sedudu Island* case, the International Court of Justice required for practice under article 31 (3) (b) that the "authorities were fully aware of and accepted this as a confirmation of the Treaty boundary."[127] Indeed, only the awareness of the position of the other parties regarding the interpretation of a treaty justifies the characterization of an agreement under article 31 (3) as an "authentic" means of interpretation.[128] It is, however, possible that the awareness of the position of the other party or parties is constructive, particularly in the case of treaties which are implemented at the national level without a common supervisory mechanism.

4. An agreement under article 31 (3) need not, as such, be legally binding

56. An "agreement" under article 31 (3) (a) need not necessarily be binding.[129] The same is true, a fortiori, for subsequent practice under article 31 (3) (b). This is confirmed by the fact that the Commission in its final articles on the law of treaties used the expression "any subsequent practice which establishes the *understanding* [emphasis added] of the parties".[130] The Vienna Conference replaced the expression "understanding" by the word "agreement" not for any substantive reason but "related to drafting only" in order to emphasize that the understanding of the parties was to be their "common" understanding.[131] The expression "understanding" suggests that the term "agreement" in article 31 (3)[132] does not require that the parties would thereby undertake or create any legal obligation existing in addition

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[127] *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999*, p. 1045, at p. 1094, para. 74 ("occupation of the island by the Masubia tribe") and pp. 1077, para. 55 ("Eason Report" which "appears never to have been made known to Germany"); Dörr, "Article 31. General rule of interpretation", p. 560, para. 88 (see footnote 11 above).

[128] In this respect the ascertainment of subsequent practice under article 31 (3) (b) may be more demanding than what the formation of customary international law requires, but see Boisson de Chazournes, "Subsequent practice, practices, and 'family resemblance': towards embedding subsequent practice in its operative milieu", p. 53-55 (see footnote 16 above).

[129] Commentary to draft conclusion 4, para. 6 (A/68/10, chap. IV.C.2); this means that a subsequent agreement under article 31 (3) (a) does not necessarily have an identical legal effect as the treaty to which it relates; in *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999*, p. 1045, at p. 1091, para. 68 the Court implied that one of the parties did not consider that certain forms of practical cooperation were legally relevant for the purpose of the question of boundary at issue and thus did not agree with a contrary position of the other party.

[130] *Yearbook of the International Law Commission, 1966*, vol. II (United Nations publication, Sales No. E.67.V.2), p. 222, para. 15.

[131] *Official Records of the United Nations Conference on the Law of Treaties*, p. 169, at para. 60 (see footnote 12 above);P. Gautier, "Les accords informels et la Convention de Vienne sur le droit des traités entre États", in *Droit du pouvoir, pouvoir du droit: mélanges offerts à Jean Salmon*, N. Angelet, ed. (Bruylant, 2007).

[132] Crawford, "A consensualist interpretation of article 31 (3) of the Vienna Convention on the Law of Treaties", p. 30 (see footnote 110 above): "There is no reason to think that the word 'agreement' in para. (b) has any different meaning as compared to the meaning it has in para. (a)"; Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties*, pp. 169-171 (see footnote 11 above).

to, or independently of, the treaty.[133] It is sufficient that the parties, by a subsequent agreement or a subsequent practice under article 31 (3), attribute a certain meaning to the treaty,[134] or in other words, adopt a certain "understanding" thereof.[135] Subsequent agreements and subsequent practice under article 31 (3) (a) and (b), even if they are not in themselves legally binding, can nevertheless, as means of interpretation, give rise to legal consequences as part of the process of interpretation according to article 31.[136]

57. This understanding of the term "agreement" in article 31 (3) has been confirmed by the jurisprudence of international courts and tribunals. International courts and tribunals have not required that an "agreement" under article 31 (3) reflect the intention of the parties to create new, or separate, legally binding undertakings (e.g. "pattern implying the agreement of the parties regarding its interpretation",[137] or "pattern ... must imply agreement on the interpretation of the relevant provision",[138] or "practice [which] reflects an agreement as to the interpretation",[139] or that "State practice" was "indicative of a lack of any apprehension on the part of the Contracting States").[140] Similarly, memoranda of understanding have, on occasion, been recognized as "a potentially important aid to interpretation" — but "not a source of independent legal rights and duties".[141]

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[133] *Case concerning a dispute between Argentina and Chile concerning the Beagle Channel*, 18 February 1977, *Reports of International Arbitral Awards*, vol. XXI, part II, p. 53, at p. 187, para. 169; *Young Loan Arbitration on German External Debts* (*Belgium, France, Switzerland, United Kingdom and United States* v. *Germany*), ILR vol. 59 (1980), pp. 541-542, para. 31; Karl, *Vertrag und spätere Praxis im Völkerrecht*, pp. 190-195 (see footnote 11 above); Kolb, "La modification d'un traité par la pratique subséquente des parties", pp. 25-26 (see footnote 115 above); Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties*, pp. 169-171 (see footnote 11 above).

[134] This terminology follows the commentary of guideline 1.2. (Definition of interpretative declarations) of the Commission's Guide to Practice on Reservations to Treaties (see A/66/10/Add.1, p. 69, paras. 18 and 19).

[135] *Yearbook of the International Law Commission, 1966*, vol. II (United Nations publication, Sales No. E.67.V.2), pp. 221-222, paras. 15 and 16 (uses the term "understanding" both in the context of what became article 31 (3) (a) as well as what became article 31 (3) (b)).

[136] *United States-United Kingdom Arbitration concerning Heathrow Airport User Charges, Award on the First Question*, 30 November 1992, *Reports of International Arbitral Awards*, vol. XXIV, p. 3, at p. 131, para. 6.7; Aust, "The theory and practice of informal international instruments", pp. 787 and 807 (see footnote 126 above); Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties*, p. 173 (see footnote 11 above); Hafner, "Subsequent agreements and practice: between interpretation, informal modification, and formal amendment" (see footnote 79 above); Gautier, "Les accords informels et la Convention de Vienne sur le droit des traités entre États", p. 434 (see footnote 131 above).

[137] WTO, Appellate Body Report, *Japan — Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 4 October 1996, section E, p. 13.

[138] WTO, Panel Report, *EC — IT Products*, WT/DS375/R, WT/DS376/R, WT/DS377/R, 16 August 2010, para. 7.558.

[139] Iran-United States Claims Tribunal, Interlocutory Award No. ITL 83-B1-FT (Counterclaim), *The Islamic Republic of Iran* v. *the United States of America*, Iran-USCTR, vol. 38 (2004-2009), p. 77, at p. 119, para. 116.

[140] *Bankovic*, para. 62 (see footnote 30 above).

[141] *United States-United Kingdom Arbitration concerning Heathrow Airport User Charges, Award on the First Question*, 30 November 1992, *Reports of International Arbitral Awards*, vol. XXIV, p. 2, at p. 131, para. 6.7; see also *Award in the Arbitration regarding the Iron Rhine ("Ijzeren Rijn") Railway between the Kingdom of Belgium and the Kingdom of the Netherlands*, Decision of 24 May 2005, *Reports of International Arbitral Awards*, vol. XXVII, part II, p. 35, at p. 98, para. 157.

Indeed, if the parties conclude a legally binding agreement regarding the interpretation of a treaty, the question arises whether such an agreement would merely purport to be a means of interpretation among others,[142] or whether it would claim precedence over the treaty, like an amending agreement under article 39 (see chap. VII.3.B below).

5. Silence as a possible element of an agreement under article 31 (3)

58. Although an "agreement" under article 31 (3) may be informal and need not necessarily be binding, it must nevertheless be identifiable in order to be "established". This requirement is formulated explicitly only for subsequent practice under article 31 (3) (b), but it is also an implicit condition for a "subsequent agreement" under article 31 (3) (a) which must be reflected in a "single common act".[143] A "subsequent agreement" under article 31 (3) (a) cannot therefore be derived from the mere silence of the parties.

59. On the other hand, the Commission has recognized that an "agreement" resulting from subsequent practice under article 31 (3) (b) can result, in part, from silence or omission. When it explained why it used the expression "the understanding of the parties" in draft article 27 (3) (b) (which later became "the agreement" in article 31 (3) (b)), and not the expression "the understanding of *all* the parties", the Commission stated that:

> It considered that the phrase 'the understanding of the parties' necessarily means 'the parties as a whole'. It omitted the word 'all' merely to avoid any possible misconception that every party must individually have engaged in the practice where it suffices that it should have accepted the practice.[144]

60. The Commission thus assumed that not all parties must have engaged in a particular practice but that such practice could, if it is "accepted" by those parties not engaged in the practice, establish a sufficient agreement regarding the interpretation of a treaty.[145] Decisions by international courts and tribunals before and after the work of Commission on the law of treaties confirm that such acceptance can be brought about by silence or omission.

(a) Case law of international courts and tribunals

61. The International Court of Justice has recognized the possibility of expressing agreement regarding interpretation by silence or omission by stating in the case concerning the *Temple of Preah Vihear* that "where it is clear that the circumstances were such as called for some reaction, within a reasonable period", the State confronted with a certain subsequent conduct by another party "must be held to have acquiesced".[146]

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[142] Crawford, "A consensualist interpretation of article 31 (3) of the Vienna Convention on the Law of Treaties", pp. 31-33 (see footnote 110 above); see, for example, *United States-United Kingdom Arbitration concerning Heathrow Airport User Charges, Award on the First Question*, 30 November 1992, *Reports of International Arbitral Awards*, vol. XXIV, p. 2, at p. 131, para. 6.8.

[143] Commentary to draft conclusion 4, para. 10 (A/68/10, chap. IV.C.2).

[144] *Yearbook of the International Law Commission, 1966*, vol. II (United Nations publication, Sales No. E.67.V.2), p. 222, para. 15.

[145] WTO, Appellate Body Report, *EC — Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, 12 September 2005, para. 259.

[146] *Case concerning the Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment of 15 June, I.C.J. Reports 1962*, p. 6, at p. 23.

62. The *Temple* case concerned a practice which may not only have implied a simple interpretation of a treaty but perhaps even a modification of a boundary treaty. However, regardless of whether a treaty can be modified by subsequent practice of the parties (see chap. VII below), the general proposition of the Court regarding the role of silence for the purpose of establishing agreement regarding the interpretation of a treaty by subsequent practice has been confirmed by later decisions[147] as well as generally by writers.[148] The "circumstances" which will "call for some reaction" include the particular setting in which the States parties interact with each other in respect of the treaty.[149]

63. The possible significance of silence for establishing an agreement regarding interpretation was explained by the Court of Arbitration in the *Beagle Channel* case.[150] In this case the Tribunal dealt with the contention by Argentina that acts of jurisdiction by Chile over certain islands could not be counted as relevant subsequent conduct since Argentina had not reacted to these acts. The Court, however, held:

> The terms of the Vienna Convention do not specify the ways in which agreement may be manifested. In the context of the present case the acts of jurisdiction were not intended to establish a source of title independent of the terms of the treaty; nor could they be considered as being in contradiction of those terms as understood by Chile. The evidence supports the view that they were public and well-known to Argentina, and that they could only derive from the Treaty. Under these circumstances the silence of Argentina permits the inference that the acts tended to confirm an interpretation of the meaning of the Treaty independent of the acts of jurisdiction themselves.[151]

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[147] See also *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 803, p. 815, para. 30; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 392, at p. 410, para. 39; *Prosecutor* v. *Furundžija*, Trial Chamber, Judgment, 10 December 1998, ICTY-95-17/1, para. 179; *Rantsev*, para. 285 (see footnote 84 above); cautiously: WTO, Appellate Body Report, *EC — Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, 12 September 2005, para. 272; see also, for a limited holding, Iran-United States Claims Tribunal, Award No. 30-16-3, *RayGo Wagner Equipment Company* v. *Iran Express Terminal Corporation*, Iran-USCTR, vol. 2 (1983), p. 141, at p. 144; *Young Loan Arbitration on German External Debts (Belgium, France, Switzerland, United Kingdom and United States* v. *Germany)*, 16 May 1980, *Reports of International Arbitral Awards*, vol. XIX, part III, p. 67; ILR, vol. 59 (1980), p. 541, para. 31.

[148] M. Kamto, "La volonté de l'État en droit international", *Recueil des cours de l'Académie de droit international de La Haye*, vol. 310 (2004), pp. 134-141; Yasseen, "L'interprétation des traités d'après la Convention de Vienne sur le droit des traités", p. 49 (see footnote 10 above); Gardiner, *Treaty Interpretation*, p. 236 (see footnote 10 above); Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, p. 431, para. 22 (see footnote 49 above); Dörr, "Article 31. General rule of interpretation", pp. 557 and 559, paras. 83 and 86 (see footnote 11 above).

[149] For example, when acting within the framework of an international organization, see *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia* v. *Greece), Judgment of 5 December 2011, I.C.J. Reports 2011*, p. 644, at pp. 675-676, paras. 99-101; Kamto, "*La volonté de l'État en droit international*", p. 136.

[150] *Case concerning a dispute between Argentina and Chile concerning the Beagle Channel*, 18 February 1977, *Reports of International Arbitral Awards*, vol. XXI, part II, p. 53.

[151] Ibid., at p. 187, para. 169 (a).

64. The significance of silence also depends on the legal situation to which the subsequent practice by the other party relates and on the claim thereby expressed. Thus, in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria*, the Court held that:

> Some of these activities — organization of public health and education, policing, administration of justice — could normally be considered to be acts *à titre de souverain*. The Court notes, however, that, as there was a pre-existing title held by Cameroon in this area, the pertinent legal test is whether there was thus evidenced acquiescence by Cameroon in the passing of the title from itself to Nigeria.[152]

65. This judgment suggests that in cases which concern treaties establishing a delimited boundary the circumstances will only very exceptionally call for a reaction. In such situations there appears to be a strong presumption that silence does not constitute acceptance of a practice.[153] It has indeed been asked whether the determination of the International Court of Justice in the case concerning the *Temple of Preah Vihear* according to which the specific circumstances of that case did call for a reaction on the part of Thailand was appropriate.[154] This aspect does not,

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[152] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 303, at p. 352, para. 67.

[153] Ibid., at p. 351, para. 64: "The Court notes, however, that now that it has made its findings that the frontier in Lake Chad was delimited ..., it follows that any Nigerian effectivités are indeed to be evaluated for their legal consequences as acts contra legem"; *Frontier Dispute, Judgment, I.C.J. Reports 1986*, p. 554, at p. 586, para. 63 : "it must however state forthwith, in general terms, what legal relationship exists between such acts and the titles on which the implementation of the principle of *uti possidetis* is grounded. For this purpose a distinction must be drawn: ... Where the act does not correspond to the law, where the territory which is the subject of the dispute is effectively administered by a State other than the one possessing legal title, preference should be given to the holder of the title. In the event that the effectivité does not coexist with any legal title, it must invariably be taken into consideration. Finally, there are cases where the legal title is not capable of showing exactly the territorial expanse to which it relates. The effectivités can then play an essential role in showing how the title is interpreted in practice"; *Case concerning the delimitation of maritime boundary between Guinea-Bissau and Senegal*, Decision of 31 July 1989, *Reports of International Arbitral Awards*, vol. XX, part II (Dissenting Opinion of Judge Bedjaoui), p. 119, at p. 181, para. 70 :"I cannot however agree with the Separate Opinion of Judge Ago in the 1982 Continental Shelf case between Tunisia and Libya, who considered that the regulations adopted on 16 April 1919 by the Italian Government in Tripolitania and Cyrenaica delimited the maritime boundary between Tunisia and Libya simply because Tunisia had not voiced an objection. Where the issue concerns a frontier — whether a maritime boundary or a land frontier — and one which is officially recognized as such, the requirements must necessarily be more strict because of the political importance of the operation. In any case, the establishment of a frontier must be the result of an agreement, and not be based on the fragile element of the absence of opposition on the part of one of the parties."

[154] See *Case concerning the Temple of Preah Vihear (Cambodia* v. *Thailand), Dissenting opinion of Judge Spender*, p. 101, at p. 128 (see footnote 90 above): "In determining what inferences may or should be drawn from Thailand's silence and absence of protest must, I believe, be had to the period of time when the events we are concerned with took place, to the region of the world to which they related, to the general conditions existing in Asia at this period, to political and other activities of Western Countries in Asia at the time and to the fact that of the two States concerned one was Asian, the other European. It would not, I think, be just to apply to the conduct of Siam in this period objective standards comparable to those which reasonably might be today or might then have been applied to highly developed European States."; see also P.C.W. Chan, "Acquiescence/estoppel in international boundaries: *Temple of Preah Vihear* revisited", *Chinese Journal of International Law*, vol. 3, 2004, p. 439; G. M. Kelly, "The *Temple Case* in historical perspective", *British Yearbook of International Law*, vol. 39 (1963), p. 471.

however, call into question the general standard the Court enunciated regarding the relevance of silence.

(b) General considerations

66. Whereas the correct application of the general legal standard on the relevance of silence for the establishment of an agreement regarding interpretation depends to a large extent on the circumstances of the specific case, certain general criteria can be derived from decisions of international courts and tribunals. They demonstrate that an acceptance by silence or omission constituting the necessary common understanding is not established easily, even beyond the area of boundary treaties.

67. Subsequent practice by one party which remains unknown to another party cannot be the basis for a common understanding resulting from the silence of this other party (see above 3). The question is, however, under which circumstances it can be expected that another State takes note of and reacts to conduct which was not communicated to it, but which is nevertheless available to it in some way, in particular by being in the public domain. Domestic parliamentary documents and proceedings, for example, are usually public but they are mostly not communicated to other parties to the treaty. International courts and tribunals have been reluctant to accept that parliamentary proceedings or court judgments are considered as subsequent practice under article 31 (3) (b) to which other parties to the treaty would be expected to react, even if such proceedings or judgments had come to their attention through other channels, including by their own diplomatic service.[155]

68. Even where a party, by its conduct, expresses a certain position towards another party (or parties) regarding the interpretation of a treaty, this does not necessarily call for a reaction by the other party or parties. In the *Kasikili/Sedudu Island* case, the International Court of Justice held that a State which did not react to the findings of a joint commission of experts that had been entrusted by the parties to determine a particular factual situation with respect to a disputed matter did not thereby provide a ground for the conclusion that an agreement had been reached with respect to the dispute.[156] This was because the parties in that particular case had considered the work of the experts as being merely a preparatory step for a separate decision subsequently to be taken on the political level. On a more general level, the WTO Appellate Body has held that:

> in specific situations, the "lack of reaction" or silence by a particular treaty party may, in the light of attendant circumstances, be understood as acceptance of the practice of other treaty parties. Such situations may occur when a party that has not engaged in a practice has become or has been made aware of the practice of other parties (for example, by means of notification or by virtue of participation in a forum where it is discussed), but does not react to it.[157]

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[155] *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002*, p. 625, at p. 650, para. 48; WTO, Appellate Body Report, *EC — Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, 12 September 2005, para. 334 ("... mere access to a published judgment cannot be equated with acceptance ...").

[156] *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999*, p. 1045, at pp. 1089-1091, paras. 65-68.

[157] WTO, Appellate Body Report, *EC — Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, 12 September 2005, para. 272 (footnote omitted).

69. This standard, with its emphasis on "notification or ... participation in a forum", is useful as a general guideline. The conditions for the relevance of silence may, however, be different for different treaties.[158] The European Court of Human Rights, in particular, frequently relies on subsequent practice when it identifies a "consensus", "vast majority", "great majority", "generally recognised rules" or a "distinct tendency"[159] and does not purport to place such practice under the condition of agreement under article 31 (3) (b). This may explain why the European Court of Human Rights — in contrast to the International Court of Justice — has hardly ever openly considered the role of silence, or acquiescence, by certain State parties for the purpose of determining the relevance of a given practice for a question of interpretation.

70. The possible legal significance of silence in the face of a subsequent practice of a party to a treaty is not limited to contributing to a possible underlying common agreement, but it may also play a role for the operation of non-consent based rules, such as preclusion or prescription.[160]

6. Subsequent practice as indicating agreement on a temporary non-application of a treaty or merely on a practical arrangement

71. A common subsequent practice does not necessarily indicate an agreement between the parties regarding the interpretation of a treaty, but may also signify their agreement to not apply the treaty temporarily, or on a practical arrangement (modus vivendi). The following examples confirm this point:

> Article 7 of the 1864 Geneva Convention provided that "[a] distinctive and uniform flag shall be adopted for hospitals, ambulances and evacuation parties. ... [the] ... flag shall bear a red cross on a white ground".[161] During the Russo-Turkish War of 1876-78 the Ottoman Empire declared that it would in the future use the red crescent on a white ground to mark its own ambulances, while respecting the red cross sign protecting enemy ambulances and stated that the distinctive sign of the Convention "has so far prevented [Turkey] from exercising its rights under the Convention because it gave offence to the Muslim soldiers".[162] This declaration led to a correspondence between the Ottoman Empire, Switzerland (as depositary) and the other parties which resulted in the acceptance of the red crescent only for the duration of

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[158] Treaties establishing international organizations will be addressed more specifically at a later stage of the work on the topic.

[159] *Rantsev*, para. 285 (see footnote 84 above); *Jorgic*, para. 69 (see footnote 29 above); *Demir and Baykara*, para. 52 (see footnote 28 above); *Sigurdur A Sigurjónsson* v. *Iceland*, 30 June 1993, Application No. 16130/90, ECHR Series A, No. 264, para. 35; *A.* v. *the United Kingdom*, 17 December 2002, Application No. 35373/97, ECHR 2002-X, para. 83; *Mazurek*, para. 52 (see footnote 29 above).

[160] *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962, I.C.J. Reports 1962*, pp. 130-131 (Dissenting Opinion of Judge Spender).

[161] Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (adopted in Geneva on 22 August 1864; entered into force on 22 June 1865).

[162] "Bulletin international des Sociétés de Secours aux Militaires blesses", No. 29, January 1877, pp. 35-37, cited in F. Bugnion, F. Bugnion, *Red Cross, Red Crescent, Red Crystal* (Geneva, International Committee of the Red Cross, 2007), or an article: F. Bugnion, "*The emblem of the Red Cross: a brief history*", *International Review of the Red Cross*, vol. 17, No. 195 (1977), pp. 283-298.

the conflict.[163] At The Hague Peace Conferences of 1899 and 1907 and during the Geneva Revision Conference 1906, the Ottoman Empire, Persia and Siam unsuccessfully requested the inclusion of the red crescent, the red lion and sun, and the red flame in the Convention.[164] The Ottoman Empire and Persia, however, at least gained the acceptance of reservations which they formulated to that effect in 1906.[165] It was only on the occasion of the revision of the Geneva Conventions in 1929, when Turkey, Persia and Egypt claimed that the use of other emblems had become a fait accompli and that those emblems had been used in practice without giving rise to any objections,[166] that the red crescent and the red lion and sun were finally recognized as a distinctive sign by article 19 (2) of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field.[167] This recognition, first by the acceptance of the reservations of the Ottoman Empire and Persia in 1906, and second by article 19 (2) of the 1929 Geneva Convention, did not mean, however, that the parties had accepted that the 1864 Geneva Convention had been modified prior to 1906 by subsequent unopposed practice. The practice by the Ottoman Empire and Persia was rather seen, until 1906, as not being covered by the 1864 Convention, but it was accepted as a temporary and exceptional measure which left the general treaty obligation unchanged.

72. Parties may also subsequently agree, expressly or by their conduct, to leave the question of the correct interpretation of a treaty open and to establish a practical arrangement (modus vivendi) subject to challenge by judicial or quasi-judicial institutions or subject to challenge by other States parties.[168] One example of such a practical arrangement is the memorandum of understanding between the Department of Transportation of the United States of America and the Secretaría de Comunicaciones y Transportes of the United Mexican States on International Freight Cross-Border Trucking Services of 6 July 2011.[169] The memorandum of understanding does not refer to the third party of the North American Free Trade

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[163] "Bulletin international des Sociétés de Secours aux Militaires blesses", No. 31, July 1877, p. 89, cited in Bugnion, *The Emblem of the Red Cross: A Brief History*, p. 18.

[164] Bugnion, *The Emblem of the Red Cross: A Brief History*, pp. 19-31.

[165] Joined by Egypt upon accession in 1923 (see Bugnion, *The Emblem of the Red Cross: A Brief History*, pp. 23-26).

[166] Actes de la Conférence diplomatique de Genève de 1929, 1930, pp. 248-49, cited in F. Bugnion, *Towards a Comprehensive Solution to the Question of the Emblem*, 4th ed. (International Committee of the Red Cross, 2006), p. 13.

[167] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, signed at Geneva on 27 July 1929 (League of Nations, *Treaty Series*, vol. 118, No. 2733).

[168] *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, p. 213, at pp. 234-235, para. 40; *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010*, p. 14, at pp. 65-66, paras. 138-140; Crawford, "A consensualist interpretation of article 31 (3) of the Vienna Convention on the Law of Treaties", p. 32 (see footnote 110 above).

[169] J. R. Crook, "Contemporary practice of the United States", *American Journal of International Law*, vol. 105 2011, pp. 809-812; see also: Mexico, Diario Oficial de la Federación (7 July 2011), *Decreto por el que se modifica el artículo 1 del diverso por el que se establece la Tasa Aplicable durante 2003, del Impuesto General de Importación, para las mercancías originarias de América del Norte, publicado el 31 de diciembre de 2002, por lo que respecta a las mercancías originarias de los Estados Unidos de América.*

Agreement (NAFTA), Canada, and specifies that it "is without prejudice to the rights and obligations of the United States and Mexico under NAFTA". These circumstances suggest that the memorandum of understanding does not claim to constitute an agreement regarding the interpretation of NAFTA under article 31 (3) (a) or (b), but that it rather remains limited to being a practical arrangement which is subject to challenge by other parties or by a judicial or quasi-judicial institution.

7. Changing or ending of an agreement regarding interpretation under article 31 (3) (a) or (b)

73. Once established, an agreement between the parties under article 31 (3) (a) and (b) can eventually come to an end. One possibility is that the parties replace it by another agreement with a different scope or content regarding the interpretation of the treaty. In this case the new agreement replaces the previous one as an authentic means of interpretation from the date of its existence, at least with effect for the future.[170]

74. It is also possible for a disagreement to arise between the parties regarding the interpretation of the treaty after they had reached a subsequent agreement regarding such interpretation. Such a disagreement will not, however, normally replace the original subsequent agreement, since the principle of good faith prevents a party from simply disavowing the legitimate expectations which have been created by a common interpretation.[171] On the other hand, clear expressions of disavowal by one party of a previously agreed subsequent practice "do reduce in a major way the significance of the practice after that date", without however diminishing the significance of the previous common practice.[172] The actual agreement of the parties at the time of the interpretation of the treaty has, of course, the highest value under article 31 (3).[173]

75. The preceding considerations suggest the following conclusion:

Draft conclusion 9
Agreement of the parties regarding the interpretation of a treaty

1. An agreement under article 31 (3) (a) and (b) need not be arrived at in any particular form nor be binding as such.

2. An agreement under article 31 (3) (b) requires a common understanding regarding the in-terpretation of a treaty of which the parties are aware. The number of parties that must actively engage in subsequent practice in order to establish an agreement under article 31 (3) (b) may vary. Silence on the part of one or more parties can, when the circumstances call for some reaction, constitute acceptance of the subsequent practice.

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[170] Hafner, "Subsequent agreements and practice: between interpretation, informal modification, and formal amendment", p. 118 (see footnote 79 above); this means that the interpretative effect of an agreement under article 31 (3) does not necessarily go back to the date of the entry into force of the treaty, as Yasseen, "L'interprétation des traités d'après la Convention de Vienne sur le droit des traités", p. 47 (see footnote 10 above), maintains.

[171] Karl, *Vertrag und spätere Praxis im Völkerrecht*, p. 151 (see footnote 11 above).

[172] *Maritime Dispute (Peru* v. *Chile), I.C.J., Judgment of 27 January 2014*, p. 52, para. 142. Available from www.icj-cij.org/docket/files/137/17930.pdf.

[173] Karl, *Vertrag und spätere Praxis im Völkerrecht*, pp. 152-153 (see footnote 11 above).

3. A common subsequent agreement or practice does not necessarily indicate an agreement between the parties regarding the interpretation of a treaty, but may instead signify their agreement temporarily not to apply the treaty or to establish a practical arrangement (modus vivendi).

VI. Decisions adopted within the framework of Conferences of States Parties

76. States use Conferences of States Parties[174] as a form of action for the continuous process of multilateral treaty review and implementation.[175]

1. Forms of Conferences of States Parties

77. There is some debate regarding the legal nature of Conferences of States Parties. For some, such a conference "is in substance no more than a diplomatic conference of States".[176] Other commentators describe them as autonomous, institutional arrangements.[177] In any case, it can be said that Conferences of States Parties reflect different degrees of institutionalization. At one end of the spectrum are those which are an organ of an international organization (e.g. those under the Organization for the Prohibition of Chemical Weapons, WTO, and the International Civil Aviation Organization) and in which States parties act in their capacity as members of that organ.[178] Such Conferences of States Parties are outside the scope of the present report, which does not address the subsequent practice of international organizations.[179] At the other end of the spectrum are those Conferences of States Parties which are provided for by treaties which foresee more or less periodic meetings of States parties for their review. Such review conferences are frameworks

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[174] Other designations include: Meetings of the Parties or Assemblies of the States Parties.

[175] See V. Röben, "Conference (Meeting) of States Parties", in *Max Planck Encyclopedia of Public International Law*, vol. II, R. Wolfrum, ed. (Oxford University Press, 2012), p. 605; R. R. Churchill and G. Ulfstein, "Autonomous institutional arrangements in multilateral environmental agreements: a little-noticed phenomenon in international law", *American Journal of International Law*, vol. 94, No. 4 (2009), p. 623; J. Brunnée, "COPing with consent: law-making under multilateral environmental agreements", *Leiden Journal of International Law*, vol. 15, No. 1 (2002), p. 1; A. Wiersema, "The new international law-makers? Conference of the Parties to multilateral environmental agreements", *Michigan Journal of International Law*, vol. 31, 2009, p. 231; L. Boisson de Chazournes, "Environmental treaties in time", *Environmental Policy and Law*, vol. 39, No. 6 (2009), p. 293.

[176] A. E. Boyle, "Saving the world? Implementation and enforcement of international environmental law through international institutions", *Journal of Environmental Law*, vol. 3, No. 2 (1993), p. 235.

[177] Churchill and Ulfstein, "Autonomous institutional arrangements in multilateral environmental agreement", p. 623; P. Sands and P. Klein, *Bowett's Law of International Institutions*, 5th ed. (Sweet and Maxwell, 2001), p. 115. The term "institutional arrangement" is employed by the World Health Organization Framework Convention on Tobacco Control (United Nations, *Treaty Series*, vol. 2302, No. 41032), (see part VIII: Institutional arrangements and financial resources), adopted in 2003.

[178] Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (Chemical Weapons Convention) (United Nations, *Treaty Series*, vol. 1974, No. 33757), opened for signature in 1993; Agreement establishing the World Trade Organization (WTO Agreement) (United Nations, *Treaty Series*, vol. 1867, No. 31874), concluded at Marrakesh in 1994; Convention on International Civil Aviation (Chicago Convention) (United Nations, *Treaty Series*, vol. 15, No. 102), signed at Chicago in 1994.

[179] International organizations will be the subject of another report.

for States parties' cooperation and subsequent conduct with respect to the treaty. They may also have specific assignments in relation to amendments and/or the adaptation of treaties. Examples include the review conference process of the 1972 Biological Weapons Convention,[180] the Review Conference under article VIII (3) of the 1968 Non-Proliferation Treaty,[181] and Conference of States Parties established by international environmental treaties.[182] Although the latter usually display a higher degree of institutionalization than the periodic review conferences under the Biological Weapons Convention and the Non-Proliferation Treaty, they are neither an international organization nor an organ thereof.

78. It is not necessary, for the purpose of the present report, to resolve doctrinal questions concerning the classification of Conferences of States Parties. In the following, a Conference of States Parties is a meeting of States parties pursuant to a treaty for the purpose of reviewing or implementing the treaty. This does not include meetings in which States parties act as members of an organ of an international organization. Reference will be made, however, to the recent judgment of the International Court of Justice in the *Whaling in the Antarctic* case[183] which addresses a borderline case, the International Whaling Commission (IWC) under the International Convention for the Regulation of Whaling.[184]

2. Types of acts adopted by States parties within the framework of a Conference of States Parties

79. The Conference of States Parties perform a variety of acts, the legal nature and implications of which depend, in the first place, on the treaty concerned. For the purpose of the present report, the most important distinction concerns the measures

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[180] Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (Biological Weapons Convention), 1972 (United Nations, *Treaty Series*, vol. 1015, No. 14860), article XI. According to this mechanism, States parties meeting in a review conference shall "review the operation of the Convention, with a view to assuring that the purposes of the preamble and the provisions of the Convention (...) are being realized. Such review shall take into account any new scientific and technological developments relevant to the Convention" (art. XII).

[181] Treaty on the Non-Proliferation of Nuclear Weapons 1968, (United Nations, *Treaty Series*, vol. 729, No. 10485); article VIII, paragraph 3, establishes that a review conference shall be held five years after its entry into force, and, if so decided, at intervals of five years thereafter "in order to review the operation of this Treaty with a view to assuring that the purposes of the preamble and the provisions of the Treaty are being realized". By way of such decisions, States parties review the operation of the Treaty on the Non-Proliferation of Nuclear Weapons, article by article, and formulate conclusions and recommendations on follow-on actions.

[182] Examples include the Conference of the Parties of the United Nations Framework Convention on Climate Change, 1992 (United Nations, *Treaty Series*, vol. 1771, No. 30822), the CMP Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto Protocol), 1997 (United Nations, *Treaty Series*, vol. 2303, No. 30822), and the Conference of the Contracting Parties of the Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar Convention), 1971 (United Nations, *Treaty Series*, vol. 996, No. 14583).

[183] *Whaling in the Antarctic (Australia* v. *Japan: New Zealand intervening), I.C.J., Judgment of 31 March 2014*, http://www.icj-cij.org/docket/files/148/18136.pdf.

[184] The Convention is often described as establishing an international organization, but it does not do so clearly, and it provides IWC with features which fit the present definition of a Conference of States Parties.

which a Conference of States Parties can adopt "to review the implementation of the treaty" and amendment procedures.[185]

80. The Conference of States Parties review powers can be contained in general clauses or in specific provisions. Article 7 (2) of the United Nations Framework Convention on Climate Change represents a typical general review clause:

> The Conference of the Parties, as the supreme body of this Convention, shall keep under regular review the implementation of the Convention and any related legal instruments that the Conference of the Parties may adopt, and shall make, within its mandate, the decisions necessary to promote the effective implementation of the Convention.

81. Such a general review power has led the Biological Weapons Conference Review Conference Process, for example, to adopt "additional agreements" regarding the interpretation of the Convention's provisions. These agreements have been adopted by States parties within the framework of review conferences, by consensus, and they "have evolved across all articles of the treaty to address specific issues as and when they arose".[186] The Biological Weapons Convention Implementation and Support Unit[187] defines an "additional agreement" as one which:

> (i) interprets, defines or elaborates the meaning or scope of a provision of the Convention; or
>
> (ii) provides instructions, guidelines or recommendations on how a provision should be implemented.[188]

82. Specific powers to review certain provisions are spread throughout the different treaties, sometimes referring to "guidelines" to be developed and proposed

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[185] Convention on Wetlands of International Importance especially as Waterfowl Habitat: article 6, paragraph 1, on review functions and article 10 bis, on amendments; United Nations Framework Convention on Climate Change: article 7, paragraph 2, on review powers, and article 15, on amendments; Kyoto Protocol, article 13, paragraph 4, on review powers of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol, article 20 on amendment procedures; Convention on International Trade in Endangered Species of Wild Fauna and Flora (United Nations, *Treaty Series*, vol. 993, No. 14537), art. XI on review Conference of the Parties, and XVII on amendment procedures Treaty on the Non-Proliferation of Nuclear Weapons; World Health Organization Framework Convention on Tobacco Control, article 23, paragraph 5 (review powers), article 28 (amendments) and article 33 (protocols).

[186] See P. Millett, "The Biological Weapons Convention: securing biology in the twenty-first century", *Journal of Conflict and Security Law*, vol. 15, No. 1 (2010), p. 33.

[187] The "Implementation Support Unit" was created by the Conference of States Parties, in order to provide administrative support to the Conference, and to enhance confidence building measures among States parties (see Final Document of the Sixth Review Conference of the States Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (BWC/CONF.VI/6), pp. 19-20).

[188] See background information document submitted by the Implementation and Support Unit, prepared for the Seventh Review Conference of the States Parties to the Convention, entitled "Additional agreements reached by previous Review Conferences relating to each article of the Convention" (BWC/CONF.VII/INF.5) (updated to include the understandings and agreements reached by that Conference, Geneva 2012).

by a Conference of States Parties,[189] and sometimes establishing that the Conference of States Parties shall define "rules and modalities".[190]

83. There are two types of amendment procedures: formal amendment procedures (which mostly need to be ratified by States parties according to their constitutional procedures), as well as tacit acceptance[191] and non-objection procedures.[192] Formal amendment procedures usually apply to the main text of the treaties, while tacit acceptance procedures commonly apply to annexes and appendices, containing lists of substances, species or other elements that need to be updated regularly. According to the tacit acceptance procedure — sometimes also called "tacit consent procedure"[193] — the amendments enter into force for all parties if they are approved by a qualified majority (usually two-thirds), and unless objected to by one or more parties within a certain period of time. When an express objection is formulated within the given timeframe, the amendment does not enter into force in respect of the party or parties formulating the objection (opt-out mechanism).

3. Subsequent agreements and subsequent practice under article 31 (3) may result from Conferences of States Parties

84. Review conferences typically oversee the operation of the treaties concerned with a view to ensuring the fulfilment of their objectives. Hence, decisions or declarations adopted within their framework perform an important function for the adaptation of the treaties to factual developments or for interpreting them in a way which the parties agree to be the correct one at a given point in time. Such decisions and declarations may also constitute or reflect subsequent agreements under article 31 (3) (a), by which the underlying treaty is interpreted. Thus, the International Maritime Organization (IMO) Sub-Division for Legal Affairs, upon a request of the governing bodies, has opined in relation to a decision on an "interpretative resolution":

> According to article 31(3) (a) of the Vienna Convention on the Law of Treaties, 1969 (the Vienna Convention), subsequent agreements between the Parties shall be taken into account in the interpretation of a treaty. The article does not provide for a specific form of the subsequent agreement containing such interpretation. This seems to indicate that, provided its intention is clear, the interpretation could take various forms, including a resolution adopted at a

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[189] This is particularly clear in the case of articles 7 and 9, of the World Health Organization Framework Convention on Tobacco Control.

[190] Article 17 of the Kyoto Protocol to the United Nations Framework Convention on Climate Change regarding emissions-trading provides an instructive example. The use of the word "rules" in this provision has provoked a debate about the legal nature of such Conference of the Parties activities, and their binding or non-binding effects. See Churchill and Ulfstein, "Autonomous institutional arrangements in multilateral environmental agreement", p. 639 (see footnote 175 above); J. Brunnée, "Reweaving the fabric of international law? Patterns of consent in environmental framework agreements", in *Developments of International Law in Treaty Making*, R. Wolfrum and V. Röben, eds. (Berlin, Springer, 2005), pp. 110-115.

[191] See website of the International Maritime Organization (www.imo.org/About/Conventions/Pages/Home.aspx).

[192] See J. Brunnée, "Treaty amendments", in *The Oxford Guide to Treaties*, D. B. Hollis, ed. (Oxford, Oxford University Press, 2012), pp. 354-360.

[193] Ibid.

> meeting of the parties, or even a decision recorded in the summary records of a meeting of the parties.[194]

85. Commentators have also read such decisions as being capable of embodying subsequent agreements regarding the application and interpretation of Non-Proliferation Treaty provisions[195] and have observed that:

> Such declarations are not legally binding in and of themselves, but they may have juridical significance, especially as a source of authoritative interpretations of the treaty.[196]

In a similar vein, with respect to the International Convention for the Regulation of Whaling the International Court of Justice has held:

> Article VI of the Convention states that "[t]he Commission may from time to time make recommendations to any or all Contracting Governments on any matters which relate to whales or whaling and to the objectives and purposes of this Convention". These recommendations, which take the form of resolutions, are not binding. However, when they are adopted by consensus or by a unanimous vote, they may be relevant for the interpretation of the Convention or its Schedule.[197]

86. The following examples support the proposition that decisions by Conferences of States Parties can embody subsequent agreements under article 31 (3) (a):

(a) Framework Convention on Tobacco Control

87. The main function of the Conference of the Parties to the World Health Organization (WHO) Framework Convention on Tobacco Control[198] is to review and promote the effective implementation of the Convention.[199] The treaty leaves room for States parties to subsequently agree on guidelines which elucidate the meaning of a rule. This necessarily implies an interpretation of the treaty. As far as the interpretations which are contained in the Conference of the Parties guidelines are "proposals", they are, as such, not legally binding. They can, however, also establish an agreed interpretation. Accordingly, the WHO Legal Counsel has recognized (albeit in an overly broad formulation) that:

> Decisions of the Conference of the Parties, as the supreme body comprising all Parties to the FCTC, undoubtedly represent a "subsequent agreement between

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[194] Agenda item 4 (Ocean fertilization), submitted by the Secretariat on procedural requirements in relation to a decision on an interpretive resolution: views of the IMO Sub-Division of Legal Affairs (International Maritime Organization, document LC 33/J/6, para. 3).

[195] D. H. Joyner, *Interpreting the Nuclear Non-Proliferation Treaty* (Oxford, Oxford University Press, 2011), p. 83; Aust, *Modern Treaty Law and Practice*, pp. 213-214 (see footnote 66 above).

[196] B. M. Carnahan, "Treaty review conferences", *American Journal of International Law*, vol. 81, No. 1 (1987), p. 229.

[197] *Whaling in the Antarctic (Australia* v. *Japan: New Zealand intervening), I.C.J., Judgment of 31 March 2014*, http://www.icj-cij.org/docket/files/148/18136.pdf, para. 46.

[198] See World Health Organization Framework Convention on Tobacco Control.

[199] Ibid., see articles 5 (4), 7, 8 and 23 (5).

the Parties regarding the interpretation of the treaty", as stated in Article 31 of the Vienna Convention.[200]

88. A guideline on article 14 of the Framework Convention, for example, demonstrates that the Conference of the Parties has subsequently specified the meaning and scope of a rule and interpreted the meaning of its terms. Article 14 states that:

> each Party shall develop and disseminate appropriate, comprehensive and integrated guidelines based on scientific evidence and best practices, taking into account national circumstances and priorities, and shall take effective measures to promote cessation of tobacco use and adequate treatment for tobacco dependence.[201]

89. The guideline on implementation of article 14, adopted by the fourth Conference of the Parties (2010), clarifies, inter alia, that tobacco addiction/dependence "means":

> a cluster of behavioral, cognitive, and physiological phenomena that develop after repeated tobacco use and that typically include a strong desire to use tobacco, difficulties in controlling its use, persistence in tobacco use despite harmful consequences, a higher priority given to tobacco use than to other activities and obligations, increased tolerance, and sometimes a physical withdrawal State.[202]

90. This definition is taken from the WHO International Statistical Classification of Diseases and related Health Problems,[203] and shows that the States parties to the Framework Convention on Tobacco Control have agreed on the endorsed definition of the world organization on health issues as an interpretation of article 14.

(b) Biological Weapons Convention

91. The Review Conference of the Biological Weapons Convention, acting under its general review functions, regularly reaches "additional understandings and agreements" relating to the provisions of the Convention. Through these understandings, States parties interpret the provisions of the Convention by defining, specifying or otherwise elaborating on the meaning and scope of the provisions, as well as through the adoption of guidelines on their implementation. Therefore,

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[200] See Conference of the Parties to the World Health Organization Framework Convention on Tobacco Control, Intergovernmental Negotiating Body on a Protocol on Illicit Trade in Tobacco Products, "Revised Chairperson's text on a protocol on illicit trade in tobacco products, and general debate: legal advice on the scope of the protocol", note by the WHO Legal Counsel on scope of the protocol on illicit trade in tobacco products (World Health Organization, document FCTC/COP/INB-IT/3/INF.DOC./6, annex). This has been also recognized in doctrine, see S. F. Halabi, "The World Health Organization's Framework Convention on Tobacco Control: an analysis of guidelines adopted by the Conference of the Parties", *Georgia Journal of International and Comparative Law*, vol. 39, 2010, pp. 14-16.

[201] See World Health Organization Framework Convention on Tobacco Control, see footnote 177 above.

[202] "Guidelines for implementation of article 14 of the WHO Framework Convention on Tobacco Control", in *WHO Framework Convention on Tobacco Control, Guidelines for Implementation — Article 5.3; Article 8; Articles 9 and 10; Article 11; Article 12; Article 13; Article 14* (Geneva, World Health Organization, 2013), p. 118.

[203] See www.who.int/classifications/icd/en/.

"additional understandings and agreements" may constitute subsequent agreements under article 31 (3) (a). The following example is illustrative: article I (1) of the Biological Weapons Convention provides that States parties undertake never in any circumstances to develop, produce, stockpile or otherwise acquire or retain:

> Microbial or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes;

At the third Review Conference (1991), States parties specified that[204]

> the prohibitions established in this provision relate to microbial or other biological agents, or toxins, which are "harmful to plants and animals, as well as humans (...)"

(c) Montreal Protocol

92. The Beijing Amendment under article 4 of the Montreal Protocol on Substances that Deplete the Ozone Layer has given rise to a debate about its interpretation. The Conference of the Parties acknowledged "that the meaning of the term 'State not party to this Protocol' may be subject to differing interpretations with respect to hydrochlorofluorocarbons by parties to the Beijing Amendment". It then decided "in that context on a practice in the application of article 4, paragraph 9 of the Protocol by establishing by consensus a single interpretation of the term 'State not party to this Protocol", to be applied by parties to the Beijing Amendment for the purpose of trade in hydrochlorofluorocarbons under article 4 of the Protocol."[205]

(d) London Dumping Convention

93. While the acts which are the result of a tacit acceptance (amendment) procedure are not, as such, subsequent agreements by the parties under article 31 (3) (a), they can, in addition to their primary effect under the treaty, under certain circumstances imply such a subsequent agreement. One example concerns certain decisions of the

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[204] Final Declaration of the Third Review Conference of the Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (BWC/CONF.III/23, part II).

[205] For details, see decision XV/3 on obligations of parties to the Beijing Amendment under article 4 of the Montreal Protocol with respect to hydrochlorofluorocarbons; the definition itself is formulated as follows: 1. (...) (a) The term "State not party to this Protocol" in article 4, paragraph 9 does not apply to those States operating under article 5, paragraph 1, of the Protocol until January 1, 2016 when, in accordance with the Copenhagen and Beijing Amendments, hydrochlorofluorocarbon production and consumption control measures will be in effect for States that operate under article 5, paragraph 1, of the Protocol; (b) The term "State not party to this Protocol" includes all other States and regional economic integration organizations that have not agreed to be bound by the Copenhagen and Beijing Amendments; (c) Recognizing, however, the practical difficulties imposed by the timing associated with the adoption of the foregoing interpretation of the term "State not party to this Protocol," paragraph 1 (b) shall apply unless such a State has by 31 March 2004: (i) Notified the Secretariat that it intends to ratify, accede or accept the Beijing Amendment as soon as possible; (ii) Certified that it is in full compliance with articles 2, 2A to 2G and article 4 of the Protocol, as amended by the Copenhagen Amendment; (iii) Submitted data on (i) and (ii) above to the Secretariat, to be updated on 31 March 2005, in which case that State shall fall outside the definition of "State not party to this Protocol" until the conclusion of the Seventeenth Meeting of the Parties (UNEP/OzL.Pro.15/9, chap. XVIII.A.).

Conference of the Parties to the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London Dumping Convention).[206] At its sixteenth meeting, held in 1993, the Consultative Meeting of Contracting Parties adopted three amendments to annex I by way of the available tacit acceptance procedure.[207] As such, these amendments were not subsequent agreements. They did, however, also imply a wide-ranging interpretation of the underlying treaty itself.[208] Indeed, the amendment refers to and builds on a resolution which was adopted by the Consultative Meeting that was held three years earlier and which had established the agreement of the parties that "[t]he London Dumping Convention is the appropriate body to address the issue of low-level radioactive waste disposal into sub-seabed repositories accessed from the sea".[209] The resolution has been described as "effectively expand[ing] the definition of 'dumping' under the Convention by deciding that this term covers the disposal of waste into or under the seabed from the sea but not from land by tunneling".[210] Thus, the amendment confirmed that the interpretative resolution contained a subsequent agreement regarding the interpretation of the treaty.

(e) Conclusion

94. These examples demonstrate that decisions of Conferences of States Parties may under certain circumstances embody subsequent agreements under article 31 (3) (a) and, a fortiori, subsequent practice under articles 31 (3) (b) and 32. Such decisions do not, however, automatically constitute a subsequent agreement under article 31 (3) (a) since it must always be specifically established. This is not the case where the parties do not intend that their agreement has any legal, but only political significance (see II above). Such an intention is identifiable in particular by the specificity and the clarity of the terms chosen in the light of the text of the Conference of the States Parties decision as a whole, its object and purpose, and the way in which it is applied.

95. It also cannot simply be said that because the treaty does not accord the Conference of the States Parties a competence to take binding decisions, all Conference of States Parties decisions are necessarily legally irrelevant and constitute only political commitments.[211] It may be true that many Conference of States Parties decisions are often not intended to embody a subsequent agreement

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[206] Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London Dumping Convention), (United Nations, *Treaty Series*, vol. 1046, No. 15749).

[207] See London sixteenth Consultative Meeting of the Contracting Parties, resolution LC.51 (16), and resolution LC.50 (16); First, the decided to amend the phase-out-dumping of industrial waste by 31 December 1995. Second, it banned the incineration at sea of industrial waste and sewage sludge. And finally, it decided to replace para. 6 of annex I, banning the dumping of radioactive waste or other radioactive matter (see "Dumping at sea: the evolution of the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (LC), 1972", *Focus on IMO* (London, International Maritime Organization, July 1997).

[208] It has even been asserted that these amendments to annex I of the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter "constitute major changes in the Convention" (see Churchill and Ulfstein, "Autonomous institutional arrangements in multilateral environmental agreement", p. 638 (see footnote 175 above)).

[209] International Maritime Organization, resolution LDC.41 (13), para. 1.

[210] Churchill and Ulfstein, "Autonomous institutional arrangements in multilateral environmental agreement", p. 641 (see footnote 175 above).

[211] See *Whaling in the Antarctic (Australia* v. *Japan: New Zealand intervening), I.C.J., Judgment of 31 March 2014*, http://www.icj-cij.org/docket/files/148/18136.pdf, para. 46.

under article 31 (3) (a) by themselves, either because they are not meant to be a statement regarding the interpretation of the treaty in the first place, or because they produce a legal effect only in combination with a general duty to cooperate under the treaty which then puts the parties "under an obligation to give due regard" to such a decision.[212] This broad assessment can, however, only justify a presumption against a general characterization of (consensual) Conference of State Parties decisions as implying subsequent agreements under article 31 (3) (a). If, however, the parties have made it sufficiently clear that the Conference of State Parties decision embodies their agreement regarding the interpretation of the treaty, such a presumption would be rebutted. Whether this is the case ultimately depends on the circumstances of each particular case. Another indication may be whether States parties uniformly or without challenge apply the treaty as interpreted by the Conference of States Parties decision. Discordant practice following a Conference of States Parties decision, on the other hand, may be an indication that States did not assume that the decision would be a subsequent agreement under article 31 (3) (a).[213] Conference of States Parties decisions which do not qualify as subsequent agreements under article 31 (3) (a) or as subsequent practice under article 31 (3) (b) may, however, nevertheless be applicable as subsidiary means of interpretation under article 32.[214]

4. Form and procedure

96. Acts which originate from Conferences of States Parties may have different forms and designations, and they may be the result of different procedures. In order to be recognized as subsequent agreements under article 31 (3) (a), decisions by conferences of States Parties must embody the "agreement" regarding the interpretation of the treaty by a "single common act".[215] The question is whether the form or the procedure of an act resulting from a Conference of States Parties gives any indication as to the agreement in substance regarding the interpretation of a treaty.

97. If the decision of the Conference of States Parties is based on a unanimous vote in which all parties participated, it can clearly embody a "subsequent agreement" under article 31 (3) (a), provided that it is "regarding the interpretation of the treaty" and unless a specific provision of the treaty does not provide otherwise or a party explicitly indicates the contrary. Conference of States Parties decisions regarding review functions are, however, normally adopted by consensus. This practice derives from rules of procedure which usually require States parties to make every effort to achieve consensus on substantive matters. An early example can be found in the Rules of Procedure of the Review Conference to the Biological Weapons Convention. According to rule 28 (2):

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[212] *Whaling in the Antarctic (Australia* v. *Japan: New Zealand intervening), I.C.J., Judgment of 31 March 2014*, http://www.icj-cij.org/docket/files/148/18136.pdf, para. 83.

[213] See V.7 above.

[214] *Whaling in the Antarctic (Australia* v. *Japan: New Zealand intervening), I.C.J., Judgment of 31 March 2014*, http://www.icj-cij.org/docket/files/148/18136.pdf (Separate Opinion of Judge *ad hoc* Charlesworth, para. 4: "I note that resolutions adopted by a vote of the IWC have some consequence although they do not come within the terms of Article 31.3 of the Vienna Convention").

[215] Commentary to draft conclusion 4, para. 10 (A/68/10, chap. IV.C.2).

> The task of the review Conference being to review the operation of the Convention with a view to assuring that the purposes of the preamble and the provisions of the Convention are being realized, and thus to strengthen its effectiveness, every effort should be made to reach agreement on substantive matters by means of consensus. There should be no voting on such matters until all efforts to achieve consensus have been exhausted.[216]

98. This formula, with only minor variations, has become the standard with regard to Conference of States Parties substantive decision-making procedures.

(a) Consensus and agreement in substance

99. The question as to whether a Conference of States Parties decision which is adopted by consensus can embody a subsequent agreement under article 31 (3) (a) was put, albeit implicitly, to the IMO Sub-Division for Legal Affairs in 2011 by the Intersessional Working Group on Ocean Fertilization, which agreed to recommend that "the IMO Legal Affairs and External Relations Division should be requested to advise the governing bodies in October 2011 about the procedural requirements in relation to a decision on an interpretative resolution and, in particular, whether or not consensus would be needed for such a decision."[217]

100. In its response, the IMO Sub-Division for Legal Affairs, while confirming that a resolution by the Conference of States Parties can, in principle, constitute a subsequent agreement under article 31 (3) (a),[218] advised the governing bodies that even if the Conference were to adopt a decision based on consensus, that would not mean that the decision would be binding on all parties. Pointing to certain decisions of national courts which did not recognize interpretative decisions made by Conferences of States Parties under related treaty regimes as being binding, the IMO Sub-Division for Legal Affairs "suggested that the way of the interpretative resolution is not 100% safe and, if pursued, it would also be advisable to adopt suitable amendments to the LC [London Convention] and LP [London Protocol] at the same time."[219]

101. The opinion of the IMO Sub-Division for Legal Affairs, although it proceeds from the erroneous assumption that a "subsequent agreement" under article 31 (3) (a) of the Vienna Convention on the Law of Treaties is or should be binding "as a treaty, or an amendment thereto",[220] ultimately comes to the correct conclusion that a subsequent agreement is not necessarily binding.[221] This position is in line with the position of the Commission according to which a subsequent agreement under article 31 (3) (a) is only one of several different means of interpretation which shall be taken into account in the process of interpretation.[222] Thus, interpretative resolutions by Conferences of States Parties which are adopted by consensus, even if they are not

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[216] See rule 28, paragraph 2, of the provisional rules of procedure for the Review Conference of the Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, held in Geneva, from 3 to 21 March 1980 (BWC/CONF.I/2).

[217] International Maritime Organization, document LC 33/4, para. 4.15.2.

[218] International Maritime Organization, document LC 33/J/6, para. 3.

[219] Ibid., para. 15.

[220] Ibid., para. 8.

[221] See above at V.4.

[222] Commentary to draft conclusion 2, para. 4 (A/68/10, chap. IV.C.2).

binding as such, can nevertheless be subsequent agreements under article 31 (3) (a) or subsequent practice under article 31 (3) (b) if there are sufficient indications that that was the intention of the parties.[223] This conclusion is compatible with the fact that some national courts have not considered certain interpretative resolutions that were adopted within the framework of related regimes to be binding.[224] It is only necessary that courts, when interpreting the treaty provision in question, give appropriate weight to an interpretative resolution, not that they accept it as binding.[225]

102. It follows that the question of whether an "interpretative resolution" requires adoption by consensus is misleading. Adoption by consensus is a necessary, but not a sufficient, condition for an agreement under article 31 (3) (b). The rules of procedure of the respective Conference of States Parties usually do not give an indication as to the possible legal effect of a resolution as a subsequent agreement under article 31 (3) (a) or a subsequent practice under article 31 (3) (b). Such rules of procedure only determine how the Conference of States Parties adopts its decisions, not their possible collateral legal effect as a subsequent agreement under article 31 (3). Although subsequent agreements under article 31 (3) (a) are not binding as such, the Vienna Convention attributes them a legal effect under article 31 which is only justified if the agreement between the parties covers the substance of the matter and is specifically present at a given point in time. The International Court of Justice has confirmed that the distinction between the form of a collective decision and the agreement in substance is pertinent in such a context.[226]

103. Consensus, on the other hand, is not a concept which necessarily indicates any degree of agreement on substance. According to the *Comments on some Procedural Questions* issued by the Office of Legal Affairs of the United Nations Secretariat in accordance with United Nations General Assembly resolution 60/286 (2006):[227]

> Consensus is generally understood as a decision-taking process consisting in arriving at a decision without formal objections and vote. It may however not necessarily reflect "unanimity" of opinion on the substantive matter. It is used to describe the practice under which every effort is made to achieve general agreement and no delegation objects explicitly to a consensus being recorded.[228]

(b) Consensus and objections

104. Since a decision taken within the framework of a Conference of States Parties, if it is to constitute a subsequent agreement under article 31 (3) (a), must express an agreement between the parties regarding a question of interpretation regarding the

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[223] *Whaling in the Antarctic (Australia* v. *Japan: New Zealand intervening), I.C.J., Judgment of 31 March 2014*, http://www.icj-cij.org/docket/files/148/18136.pdf, (Separate Opinion of Judge Greenwood, para. 6, and Separate Opinion of Judge *ad hoc* Charlesworth, para. 4).

[224] For references, see International Maritime Organization, document LC 33/J/6, paras. 8-13.

[225] Commentary to draft conclusion 2, para. 4 (A/68/10, chap. IV.C.2).

[226] *Whaling in the Antarctic (Australia* v. *Japan: New Zealand intervening), I.C.J., Judgment of 31 March 2014*, http://www.icj-cij.org/docket/files/148/18136.pdf, para. 83.

[227] See General Assembly resolution 60/286 of 8 September 2006, on revitalization of the General Assembly, requiring the United Nations Secretariat "to make precedents and past practice available in the public domain with respect to rules and practices of the intergovernmental bodies of the Organization" (para. 24).

[228] See "Consensus in UN practice: general", paper prepared by the Secretariat. Available from http://legal.un.org/ola/media/GA_RoP/GA_RoP_EN.pdf.

substance of a treaty provision, certain decisions, despite having been declared as being adopted by consensus, cannot represent a subsequent agreement under article 31 (3) (a). This is true in particular for such decisions which have been adopted in the face of an objection by one or more States. The following example is illustrative:

105. At its Sixth Meeting in 2002, the Conference of the Parties to the Convention on Biological Diversity worked on formulating guiding principles for the prevention, introduction and mitigation of impacts of alien species that threaten ecosystems, habitats or species.[229] After several efforts to reach an agreement had failed, the President of the Conference of the Parties proposed that the decision be adopted, and the reservations which Australia had raised in the final report of the meeting be recorded. Australia's representative reiterated that the guiding principles could not be accepted and that "his formal objection therefore stood".[230] The President declared the debate closed and "following established practice", adopted the decision without a vote, clarifying that the objections of the dissenting States would be reflected in the final report of the meeting. Following the adoption, Australia reiterated its view that consensus is adoption without formal objection and expressed grave concerns about the legality of the adoption of the draft decision. At the end, Australia requested that "in the event of the President's decision that the text had been adopted, Australia wished the inclusion of a detailed statement in the report, to the effect that Australia did not agree with some specific elements in the guiding principles (...)". In addition to the inclusion of this statement in the final report of the meeting, a footnote to decision VI/23 indicates that "one representative entered a formal objection during the process leading to the adoption of this decision and underlined that he did not believe that the Conference of the Parties could legitimately adopt a motion or a text with a formal objection in place. A few representatives expressed reservations regarding the procedure leading to the adoption of this decision".[231]

106. In this situation, the Executive Secretary of the Convention on Biological Diversity formulated a request for a legal opinion from the United Nations Legal Counsel,[232] who responded that a party could "disassociate from the substance or text of the document, indicate that joining consensus does not constitute acceptance of the substance or text or parts of the document and/or present any other restrictions on its Government's position on the substance or text of the document (...), [but] that by definition (...) where there is formal objection, there is no consensus."[233] He added that in the face of Australia's clear objection, the President of the Conference of the Parties should not have proceeded to declare the decision adopted by consensus and that by doing so, he had "clearly acted contrary to established practice". However, he concluded, that despite the serious procedural flaws, "once the Chairman declared the decision adopted, the representative of Australia did not formally object to the adoption or seek to nullify the decision

[229] See decision VI/23 (UNEP/CBD/COP/6/20, annex I).

[230] Report of the sixth meeting of the Conference of the Parties to the Convention on Biological Diversity, (UNEP/CBD/COP/6/20), para. 313.

[231] Ibid., paras. 294-324.

[232] Available from the secretariat of the Convention on Biological Diversity, document SCBD/SEL/DBO/30219 (6 June 2002).

[233] Available from the secretariat of the Convention on Biological Diversity, document UNEP/SCBD/30219R (17 June 2002).

itself". In the view of the United Nations Legal Counsel, Australia's post-adoption position constituted a reservation on the procedure, rather than a formal objection against the decision.[234] Later, at the eighth meeting of the Conference of the Contracting Parties to the Ramsar Convention, in November 2002, Australia took the opportunity to make a formal statement, and stated that it did not agree with the United Nations Legal Counsel's opinion, and did not accept that the decision had been validly adopted at the sixth meeting of the Conference of Parties to the Convention on Biological Diversity.[235]

107. The above-mentioned decision under the Convention on Biological Diversity, as well as a similar decision by the Climate Change Conference held in Cancún in 2010 under the Kyoto Protocol to the Climate Change Convention (Bolivia's objection notwithstanding),[236] raise the important question of what "consensus" means.[237] This issue must, however, be distinguished from the question of under which circumstances the parties to a treaty arrive at an agreement regarding substantive matters of the interpretation of a treaty under article 31 (3) (a) and (b).

5. Acts not adopted in the presence of all parties to a treaty

108. Decisions by Conferences of States Parties are not necessarily adopted by all parties to a treaty. Although all parties usually have the possibility pursuant to a treaty to participate in a Conference of States Parties, some may choose not to attend the meeting. In such cases the question may arise as to whether a decision by a Conference of States Parties, which would be a subsequent agreement under article 31 (3) (a) if all the parties had adopted it, can also be so considered if one or more parties did not participate in the Conference.

109. It would be difficult to assume that a party to a treaty has agreed, by its consent to be bound by the treaty, to accept decisions which are subsequently taken in its absence by other States parties within the framework of the Conference of States Parties concerned. It should therefore be possible for non-participating States to subsequently express their disagreement with a decision that was taken within the framework of a Conference of States Parties. On the other hand, the principle of good faith and the duty to cooperate within the treaty framework speak in favour of a duty of non-participating States to articulate their possible disagreement as soon as possible under the circumstances, otherwise their agreement in the form of silence (acquiescence) would have to be assumed.

110. There remains the more doctrinal question of whether a Conference of States Parties decision with which non-participating States have agreed by their subsequent

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[234] Ibid.

[235] Report of the eighth Meeting of the Conference of the Contracting Parties to the Convention on Wetlands of International Importance especially as Waterfowl Habitat, Valencia, Spain, 18-26 November 2002, available from www.ramsar.org/cda/en/ramsar-documents-cops-cop8-report-of-8th/main/ramsar/1-31-58-128^17797_4000_0__.

[236] See decision 1/CMP.6 on the Cancun Agreements: outcome of the work of the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol at its fifteenth session; and decision 2/CMP.6 the Cancun Agreements: land use, land-use change and forestry, adopted by Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol (FCCC/KP/CMP/2010/12/Add.1); and proceedings of the Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol (FCCC/KP/CMP/2010/12), para. 29.

[237] See "Third report for the ILC Study Group on Treaties over Time" in *Treaties and Subsequent Practice*, G. Nolte, ed. (Oxford, Oxford University Press, 2013), pp. 372-377.

silence should be conceived as a subsequent agreement under article 31 (3) (a) or rather as a subsequent practice under 31 (3) (b). The fact that the Commission has distinguished both forms of subsequent conduct by requiring, for a subsequent agreement under article 31 (3) (a), a "common act"[238] seems, at first impression, to lead to the conclusion that such an agreement is not based on such a "common act". It is, however, also possible to regard such a decision by the Conference of States Parties as an inchoate "common act" which is completed by the implicit acceptance by the non-participating States within a reasonable time. The latter seems to be the better view, given the centrality of the collective act and the constructive character of the acceptance of the non-participating States.

111. The preceding considerations suggest the following conclusion:

Draft conclusion 10
Decisions adopted within the framework of a Conference of States Parties

(1) A Conference of States Parties, under these draft conclusions, is a meeting of States parties pursuant to a treaty for the purpose of reviewing or implementing the treaty, except if they act as members of an organ of an international organization.

(2) The legal effect of a decision adopted within the framework of a Conference of States Parties depends primarily on the treaty and the applicable rules of procedure. Depending on the circumstances, such a decision may embody a subsequent agreement under article 31 (3) (a), or give rise to subsequent practice under article 31(3) (b) or article 32.

(3) A decision adopted within the framework of a Conference of States Parties embodies a subsequent agreement or subsequent practice under article 31 (3) in so far as it expresses agreement in substance between the parties regarding the interpretation of a treaty, regardless of the form and the procedure by which the decision was adopted.

VII. Scope for interpretation by subsequent agreements and subsequent practice

112. According to article 31 (3), subsequent agreements and subsequent practice shall be taken into account in the "interpretation" of a treaty. This raises the question of the scope, and thus also the limits, of subsequent agreements and subsequent practice as means of interpretation, including the relation to other legal effects which subsequent agreements and subsequent practice may have according to the law of treaties.

1. Specific interpretation procedures and article 31 (3) (a) and (b)

113. Interpretation by subsequent agreements and subsequent practice can be provided for by the treaty itself. Some treaties contain special clauses regarding the interpretation of treaties by their parties or by treaty organs. Article IX:2 of the WTO Agreement, for example, provides that "the Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement

[238] Commentary to draft conclusion 4, para. 10 (A/68/10, chap. IV.C.2).

and of the Multilateral Trade Agreements" by a decision that "shall be taken by a three-fourths majority of the Members." In *EC — Chicken Cuts*, the Appellate Body did not, however, see a *lex specialis* relationship between article IX:2 and the means of interpretation under article 31 (3) of the Vienna Convention:

> [w]e fail to see how the express authorization in the WTO Agreement for Members to adopt interpretations of WTO provisions which requires a three-quarter majority vote and not a unanimous decision would impinge upon recourse to subsequent practice as a tool of treaty interpretation under Article 31(3)(b) of the Vienna Convention.[239]

114. Other courts and tribunals have come to the same conclusion with respect to comparable clauses in other treaties.[240] Commentators have concluded that specific interpretation clauses are not usually intended to exclude recourse to the means of interpretation under article 31 (3) (a) and (b).[241]

2. The relationship between interpretation and modification

115. In the case concerning the *Dispute regarding Navigational and Related Rights*, the International Court of Justice has held that "subsequent practice of the parties, within the meaning of Article 31 (3) (b) of the Vienna Convention, can result in a departure from the original intent on the basis of a tacit agreement".[242] It is not entirely clear whether the Court thereby wanted to recognize that subsequent practice under article 31 (3) (b) may also have the effect of modifying a treaty, or whether it was merely making a point relating to the interpretation of treaties. The second alternative is possible since the "original" intent of the parties is not necessarily conclusive for the interpretation of a treaty. Indeed, the Commission recognized in provisionally adopted draft conclusion 3 that subsequent agreements and subsequent practice, like other means of interpretation, "may assist in determining whether or not the presumed intention of the parties upon the conclusion of the treaty was to give a term used a meaning which is capable of evolving over time".[243] The scope for "interpretation" is therefore not necessarily

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[239] WTO, Appellate Body Report, *EC — Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, 12 September 2005, para. 273.

[240] *Case concerning a dispute between Argentina and Chile concerning the Beagle Channel*, 18 February 1977, *Reports of International Arbitral Awards*, vol. XXI, part II, p. 53, at p. 187, para. 169 and p. 188, para. 173; *Methanex Corporation v. United States of America*, UNCITRAL Arbitration Under NAFTA Chapter Eleven, Final Award on Jurisdiction and Merits, 9 August 2005, (www.state.gov/documents/organization/51052.pdf), Part II, Chapter H, para. 23.

[241] Hafner, "Subsequent agreements and practice: between interpretation, informal modification, and formal amendment", p. 120 (see footnote 79 above); E. Pan, "Authoritative interpretation of agreements: developing more responsive international administrative regimes", *Harvard International Law Journal*, vol. 38, 1997, pp. 519-525.

[242] *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009*, p. 213, at p. 242, para. 64; see also *Question of the tax regime governing pensions paid to retired UNESCO officials residing in France*, Decision of 14 January 2003, *Reports of International Arbitral Awards*, vol. XXV, part IV, p. 231, at p. 256, para. 62; Yasseen, "L'interprétation des traités d'après la Convention de Vienne sur le droit des traités", p. 51 (see footnote 10 above); Kamto, "La volonté de l'État en droit international", pp. 134-141 (see footnote 148 above); R. Bernhardt, *Die Auslegung völkerrechtlicher Verträge*, (Heymann, 1963), p. 132.

[243] Draft conclusion 3 (A/68/10, chap. IV.C.1) and commentary to draft conclusion 3, paras. 1-18 (ibid., chap. IV.C.2).

determined by a fixed "original intent", but must rather be determined by taking into account a broader range of considerations, including certain later developments.

116. From a practical point of view, the somewhat ambiguous dictum of the International Court raises the inextricably connected questions of how far subsequent agreements and subsequent practice under article 31 (3) can contribute to "interpretation", and whether subsequent agreements and subsequent practice may have the effect of modifying a treaty. Both questions come under the present topic as they "remain within the scope of the law of treaties" and they concern the "main focus" of the topic, which is "the legal significance of subsequent agreements and subsequent practice for interpretation" "as explained in the original proposal for the topic".[244] Indeed, the dividing line between the interpretation and the modification of a treaty is in practice often "difficult, if not impossible, to fix".[245]

3. Modification of a treaty by subsequent agreements or subsequent practice

117. It is necessary to make a distinction when addressing the interconnected questions of the possible scope of subsequent agreements and subsequent practice as means of interpretation and whether those forms of action can also lead to a modification of a treaty. Whereas the question whether a treaty may be modified by the subsequent practice of the parties has provoked a debate at the Vienna Conference as well as significant judicial and other pronouncements since (a), the question of a possible modification of a treaty by a subsequent agreement raises somewhat different, but closely related issues (b).

(a) Modification of a treaty by subsequent practice

118. In its *Draft Articles on the Law of Treaties* the Commission proposed to include a provision in the Vienna Convention which would have explicitly recognized the possibility of a modification of treaties by subsequent practice. Draft article 38 read:

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[244] The Study Group on Treaties over Time noted, as part of its recommendation to the Commission in 2012 on the change of work on the topic, that "[i]t would be understood that the topic would remain within the scope of the law of treaties. The main focus would be on the legal significance of subsequent agreements and subsequent practice for interpretation (article 31 of the Vienna Convention on the Law of Treaties), as explained in the original proposal for the topic", A/67/10, chap. X, p. 124, para. 238); at its 3136th meeting, on 31 May 2012, the Commission decided (a) to change … the format of the work on this topic as suggested by the Study Group (ibid., p. 133, para. 269).

[245] Sinclair, *The Vienna Convention on the Law of Treaties*, p. 138 (see footnote 102 above); Gardiner, *Treaty Interpretation*, p. 243 (see footnote 10 above); Murphy, "*The relevance of subsequent agreement and subsequent practice for the interpretation of treaties*", p. 90 (see footnote 66 above); Simma, "Miscellaneous thoughts on subsequent agreements and practice", p. 46 (see footnote 107 above); Karl, *Vertrag und spätere Praxis im Völkerrecht*, pp. 42-43 (see footnote 11 above); J.-M. Sorel and V. Boré Eveno, "Article 31: Convention of 1969", *The Vienna Conventions on the Law of Treaties — A Commentary*, in O. Corten and P. Klein, eds. (Oxford, Oxford University Press, 2011), p. 825, para. 42; Dörr, "Article 31. General rule of interpretation", p. 555, para. 76 (see footnote 11 above); this is true even if the two processes can theoretically be seen as being "legally quite distinct", see the Dissenting Opinion of Judge Parra-Aranguren in *Kasikili/Sedudu Island (Botswana/Nambia), Judgment, I.C.J. Reports 1999*, p. 1045, at pp. 1212-1213, para. 16; similarly Hafner, "Subsequent agreements and practice: between interpretation, informal modification, and formal amendment", p. 114 (see footnote 79 above); Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties*, p. 168 (see footnote 11 above).

Modification of treaties by subsequent practice

A treaty may be modified by subsequent practice in the application of the treaty establishing the agreement of the parties to modify its provisions.[246]

119. This draft article gave rise to a controversial debate at the Vienna Conference.[247] A majority of States expressed objections. Some thought that a modification of a treaty would normally require following the formal amendment procedure.[248] There was also concern that the stability of treaties and treaty relations could be endangered if a possibility of informal modification was recognized, and that the proposed draft article could lead to abuse and weaken the principle *pacta sunt servanda*.[249] It was also said that informal modifications of treaties by subsequent practice could give rise to problems of domestic constitutional law.[250] Some States called into question whether the draft article was actually necessary since the draft article which dealt with subsequent practice as a means of interpretation (the later article 31 (3) (b)) covered what was needed, and that it was difficult in any case to draw a distinction between interpretation and modification.[251] Finally, concerns were voiced about the possibility that modifications could be brought about without the necessary agreement of all the parties to a treaty[252] and that minor officials could produce modifications beyond the control of the competent state organs.[253]

120. Other States were of the opinion that international law was not as formalistic as domestic law.[254] It was said that informal modifications of treaties by subsequent practice had previously been recognized by judicial bodies[255] and that they had never created problems in a domestic constitutional context.[256] Some issues which had arisen in practice could not be dealt with by way of interpretation. Another argument was that, if all the parties agreed to apply the treaty in a way which deviated from its original meaning, there could be no violation of the principle *pacta sunt servanda*.[257] Several delegations considered draft article 38 as a pre-existing rule or principle of international law.[258]

121. Special Rapporteur Waldock, acting as expert consultant at the Conference, said, inter alia, that he was surprised that some delegations seemed to think that article 38 constituted a quasi-violation of the principle *pacta sunt servanda*,

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[246] *Yearbook of the International Law Commission, 1966*, vol. II (United Nations publication, Sales No. E.67.V.2), p. 236.

[247] Distefano, "La pratique subséquente des États parties à un traité", pp. 56-61 (see footnote 10 above).

[248] *Official Records of the United Nations Conference on the Law of Treaties*, p. 208, para. 63 (France) (see footnote 12 above).

[249] Ibid., p. 210, para. 75 (Chile); p. 212, para. 35 (Uruguay).

[250] Ibid., p. 208, para. 58 (Japan); p. 208, para. 63 (France); p. 209, para. 68 (Spain); p. 211, para. 21 (Colombia).

[251] Ibid., p. 207, para. 57 (Finland).

[252] Ibid., p. 208, para. 73 (Spain).

[253] Ibid., p. 209, para. 68 (Spain); p. 211, para. 6 (United States of America).

[254] Ibid., p. 211, para. 9 (Iraq); para. 22 (Italy).

[255] Ibid., p. 214, para. 51 (Argentina).

[256] Ibid., p. 214, para. 57 (Sir Humphrey Waldock).

[257] Ibid., p. 214, para. 51 (Argentina), see also p. 213, para. 49 (Cambodia).

[258] Ibid., p. 212, para. 33 (Austria); p. 214, para. 51 (Argentina); see also p. 211, para. 22 (Italy): "a legal fact which had always existed" and p. 213, para. 48 (Israel).

especially as the legal basis of the article was good faith. He also addressed the concern that article 38 might authorize variations of treaties in violation of internal law. In his view, so far, "such modified applications of treaties had never raised any constitutional problem. The variations normally did not touch the main basis of the treaty and did not give rise to any objections from parliaments."[259]

122. An amendment to delete draft article 38 was put to a vote and was adopted by 53 votes to 15, with 26 abstentions. After the Vienna Conference, writers discussed the question whether the rejection of draft article 38 at the Vienna Conference means that the possibility of a modification of a treaty by subsequent practice of the parties was thereby excluded. They mostly came to the conclusion that the negotiating States simply did not wish to address this question in the Convention and that treaties can, as a general rule under the customary law of treaties, indeed be modified by subsequent practice which establishes the agreement of the parties to that effect.[260]

123. In order properly to assess this question today it is necessary to determine, in the first place, whether the possibility of a modification by subsequent practice has been recognized, after the adoption of the Vienna Convention, by international courts and in State practice.

(i) International Court of Justice

124. Aside from the above-mentioned dictum in the case concerning the *Dispute regarding Navigational and Related Rights*,[261] it appears that the International Court of Justice has not explicitly recognized that a particular subsequent practice has had the effect of modifying a treaty. Some cases have, however, been read as implying that, in substance, this was the case. This is true, in particular, of the *Namibia Advisory Opinion* where the Court held that article 27 (3) of the Charter of

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[259] Ibid., pp. 214-215, paras. 55-58 (Sir Humphrey Waldock).

[260] Sinclair, *The Vienna Convention on the Law of Treaties*, p. 138 (see footnote 102 above); Gardiner, *Treaty Interpretation*, pp. 243-245 (see footnote 10 above); Yasseen, "L'interprétation des traités d'après la Convention de Vienne sur le droit des traités", pp. 51-52 (see footnote 10 above); Kamto, "La volonté de l'État en droit international", p. 134 (see footnote 148 above); Aust, *Modern Treaty Law and Practice*, p. 213 (see footnote 66 above); Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, p. 432, para. 23 (see footnote 49 above); Dörr, "Article 31. General rule of interpretation", p. 555, para. 76 (see footnote 11 above) (in accord Odendahl, "Article 39. General rule regarding the amendment of treaties", p. 702, paras. 10-11) (see footnote 11 above); Distefano, "*La pratique subséquente des États parties à un traité*", pp. 62-67 (see footnote 10 above); H. Thirlway, "The law and procedure of the International Court of Justice 1960-1989: supplement, 2006 — part three", *British Yearbook of International Law*, vol. 77, No. 1 (2006), p. 65; M. N. Shaw, *International Law*, 6th ed. (Cambridge, Cambridge University Press, 2003), p. 934; I. Buga, "Subsequent practice and treaty modification", in *Conceptual and Contextual Perspectives on the Modern Law of Treaties*, M. J. Bowman and D. Kritsiotis, eds. (forthcoming), at note 65 with further references; disagreeing with this view, in particular, (stressing the solemnity of the conclusion of a treaty in contrast to the informality of practice); Murphy, "*The relevance of subsequent agreement and subsequent practice for the interpretation of treaties*", pp. 89-90 (see footnote 66 above); also critical Hafner, "Subsequent agreements and practice: between interpretation, informal modification, and formal amendment", pp. 115-117 (see footnote 79 above) (differentiating between the perspectives of courts and States, as well as emphasizing the importance of amendment provisions in this context).

[261] *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, p. 213, at p. 242, para. 64.

the United Nations, according to which decisions of the Security Council on non-procedural matters shall be made including the "concurring" votes of the permanent members, did not constitute "a bar to the adoption of resolutions" when one or more permanent members abstained. According to the Court, "the proceedings of the Security Council extending over a long period supply abundant evidence that presidential rulings and the positions taken by members of the Council, in particular its permanent members, have consistently and uniformly interpreted the practice of voluntary abstention by a permanent member as having been "generally accepted by the members of the United Nations" and as evidencing "a general practice of the Organization".[262] And in the *Wall Advisory Opinion* the Court considered that the "increasing tendency over time for the General Assembly and the Security Council to deal in parallel with the same matter concerning the maintenance of international peace and security is consistent with Article 12, paragraph 1, of the Charter."[263]

125. The Court came to this conclusion although Article 12 of the Charter states that "while the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation". The only reason given by the Court as to why this "increasing tendency over time" was compatible with Article 12, paragraph 1, of the Charter was that it had been an "accepted practice of the General Assembly, as it has evolved".[264]

126. In these advisory opinions, the Court recognized that subsequent practice had an important, and even a decisive effect on the determination of the meaning of the treaty, but it stopped short of explicitly recognizing that such practice had actually led to a modification of the treaty.[265] Another reason why the value of these cases may be limited is that they concern treaties establishing an international organization. The Vienna Convention on the Law of Treaties indicates by way of its article 5 (which refers in particular to the "rules of the organization") that such treaties may possess a special character. Article 2 (j) of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations[266] even refers to the "established practice of the organization" as a specific form of subsequent practice for international organizations. It would therefore not seem to be appropriate to derive a general rule of the law of treaties solely from precedents which concern a distinguishable type of treaty for which subsequent practice may play a specific role. It is also for this reason that the questions of subsequent practice and subsequent agreements relating to international organizations will be the subject of a later report.[267]

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[262] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16, at p. 22, para. 22.

[263] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at p. 149, para. 27.

[264] Ibid.

[265] Thirlway, "The law and procedure of the International Court of Justice 1960-1989, p. 64 (see footnote 252 above).

[266] Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, A/CONF.129/15.

[267] See already A/67/10, p. 124, para. 238, and A/63/10, annex A, p. 383, para. 42.

127. Other cases in which the Court has raised the issue of a possibly modifying effect of the subsequent practice of the parties mostly concern boundary treaties. As the Court has said in the *case* concerning the *Land and Maritime Boundary between Cameroon and Nigeria*:

> Here the conduct of Cameroon in that territory has pertinence only for the question of whether it acquiesced in the establishment of a change in treaty title, which cannot be wholly precluded as a possibility in law.[268]

128. The best-known case in which the Court may have found such an acquiescence is the case concerning the *Temple of Preah Vihear*, where it placed decisive emphasis on the fact that there had been clear assertions of sovereignty by one side (France) which, according to the Court, required a reaction on the part of the other side (Thailand).[269] This judgment, however, was rendered before the adoption of the Vienna Convention and was thus at least implicitly taken into account by States in their debate at the Vienna Conference.[270] It also stops short of explicitly recognizing the modification of a treaty by subsequent practice as the Court left open whether the line on the French map was compatible with the watershed line that had been agreed upon in the original boundary treaty between the two States — although it is often assumed that this was not the case.[271]

129. In conclusion, while raising the possibility that a treaty might be modified by the subsequent practice of the parties, the Court has so far not explicitly recognized that such an effect has actually been produced in a specific case. The Court has rather found formulations which left open the possibility that it had merely arrived at a particularly broad interpretation, or a very specific interpretation which was difficult to reconcile with the ordinary meaning of the text of the treaty, but which coincided with the identified practice of the parties.

(ii) Arbitral tribunals

130. Arbitral tribunals, on the other hand, have occasionally confirmed that subsequent practice of the parties may lead to a modification of the express terms of a treaty and have applied this perceived rule. In the *Case of Eritrea* v. *Ethiopia* the Arbitral Tribunal came to the conclusion that the boundary, as it resulted from the text of the treaty, had in fact been modified in certain areas by the subsequent

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[268] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 303, at p. 353, para. 68.

[269] *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, p. 6, at p. 30: "an acknowledgement by conduct was undoubtedly made in a very definite way ... it is clear that the circumstances were such as called for some reaction"; "a clearer affirmation of title on the French Indo-Chinese side can scarcely be imagined" and therefore "demanded a reaction".

[270] M. Kohen, "Uti possidetis, prescription et pratique subséquente à un traité dans l'affaire de l'Île de Kasikili/Sedudu devant la Cour internationale de Justice", *German Yearbook of International Law*, vol. 43 (2000), p. 272.

[271] Ibid., p. 26: "a fact, which if true, must have been no less evident in 1908". Judge Parra-Aranguren has opined that the *Temple* case demonstrated "that the effect of subsequent practice on that occasion was to amend the treaty", *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999*, p. 1045, at pp. 1212-1213, para. 16 (Dissenting Opinion of Judge Parra-Aranguren); Buga, "Subsequent practice and treaty modification", at note 113 (see footnote 252 above).

practice of the parties.[272] A modification by subsequent practice was also recognized in the *Air Transport Services Agreement* case in which the Arbitral Tribunal found that the Air Transport Services Agreement between the United States and France was effectively modified by a subsequent practice of US airlines flying to certain destinations which were not covered by the original agreement. The Arbitral Tribunal stated:

> This course of conduct may, in fact, be taken into account not merely as a means useful for interpreting the agreement, but also as something more: that is, as a possible source of a subsequent modification, arising out of certain actions or certain attitudes, having a bearing on the juridical situation of the Parties and on the rights that each of them could properly claim.[273]

131. The holding in the *Case of Eritrea* v. *Ethiopia* has, however, been characterized by a commentator as being an "isolated exception"[274] (at least in the context of the determination of boundaries) and the award in the *Air Transport Services Agreement* case was rendered before the Vienna Conference and was critically referred to at the Conference.[275]

(iii) World Trade Organization

132. The WTO Appellate Body has made it clear that it would not accept an interpretation which would result in a modification of a treaty obligation, as this would not anymore be an "application" of an existing treaty provision.[276] The insistence by the Appellate Body that subsequent agreements or subsequent practice may not lead to a modification of applicable provisions under the WTO covered agreements must, however, be read in the light of the specific provision of article 3.2. of the Dispute Settlement Understanding, according to which "[r]ecommendations and rulings of the [Dispute Settlement Body] cannot add to or diminish the rights and obligations provided in the covered agreements".

(iv) European Court of Human Rights

133. The European Court of Human Rights has on occasion recognized the subsequent practice of the parties as a possible source for a modification of the

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[272] *Decision regarding delimitation of the border between Eritrea and Ethiopia*, 13 April 2002, *Reports of International Arbitral Awards*, vol. XXV, p. 83, at pp. 110-111, paras. 3.6.-3.10; see also *Case concerning the location of boundary markers in Taba between Egypt and Israel*, 29 September 1988, *Reports of International Arbitral Awards*, vol. XX, p.1, at p. 56, paras. 209 and 210 in which the Arbitral Tribunal held, in an obiter dictum, "that the demarcated boundary line would prevail over the Agreement if a contradiction could be detected".

[273] *Interpretation of the Air Transport Services Agreement between the United States of America and France*, 22 December 1963, *Reports of International Arbitral Awards*, vol. XVI, p. 5, at pp. 62-63.

[274] M. Kohen, "Keeping subsequent agreements and practice in their right limits", in *Treaties and Subsequent Practice*, G. Nolte, ed. (Oxford, Oxford University Press, 2013), p. 43; this assessment has, however, been contested, see Kolb, "La modification d'un traité par la pratique subséquente des parties", p. 20 (see footnote 115 above), who refers to the Iran-United States Claims Tribunal and the *Taba Arbitration*.

[275] *Official Records of the United Nations Conference on the Law of Treaties*, p. 208, para. 58 (Japan) (see footnote 12 above); Murphy, "The relevance of subsequent agreement and subsequent practice for the interpretation of treaties", p. 89 (see footnote 66 above).

[276] WTO, Appellate Body Report, *EC — Bananas III*, Second Recourse to Article 21.5, WT/DS27/AB/RW2/ECU, WT/DS27/AB/RW/USA, 26 November 2008, paras. 391-393.

Convention. *Al-Saadoon and Mufdhi* v. *the United Kingdom* concerned the permissibility of the transfer by a Convention State of a person to a non-Convention State where he or she faced a real risk of being sentenced to death. The case turned on the question of whether article 3 of the Convention, which prohibits subjecting a person "to inhuman or degrading treatment or punishment", should be interpreted as prohibiting such a measure. However, to interpret article 3 in that way would appear to be incompatible with article 2 of the Convention, which protects the right to life against intentional deprivation "save in the execution of a sentence of a court following his conviction of a crime". In *Al-Saadoon and Mufdhi*, the Court recalled that it had already recognized, in an obiter dictum in the 1989 case of *Soering* v. *the United Kingdom*,

> that an established practice within the member States could give rise to an amendment of the Convention. In that case the Court accepted that subsequent practice in national penal policy, in the form of a generalised abolition of capital punishment, could be taken as establishing the agreement of the Contracting States to abrogate the exception provided for under Article 2 § 1 and hence remove a textual limit on the scope for evolutive interpretation of Article 3 (ibid., pp. 40-41, § 103).[277]

134. Applying the same reasoning, the Court came to the following conclusion in *Al-Saadoon and Mufdhi*:

> All but two of the Member States have now signed Protocol No. 13 and all but three of the States which have signed have ratified it. These figures, together with consistent State practice in observing the moratorium on capital punishment, are strongly indicative that Article 2 has been amended so as to prohibit the death penalty in all circumstances. Against this background, the Court does not consider that the wording of the second sentence of Article 2 § 1 continues to act as a bar to its interpreting the words "inhuman or degrading treatment or punishment" in Article 3 as including the death penalty (cf. Soering, cited above, §§ 102-104).[278]

135. The Court concluded that a violation of article 3 of the Convention had occurred by the transfer of a person in time of war by a Contracting State to a non-Contracting State where that person faced a real risk of being subjected to the death penalty. Although the Court has been quite explicit in its reasoning, its recognition of a modification of article 2 of the Convention by the practice of States could be interpreted as an obiter dictum if one considered that the decision rests solely on article 3. Such reasoning would, however, artificially separate two inextricably interconnected provisions.

(v) Other international courts and tribunals

136. Other international courts and tribunals, such as the International Tribunal for the Law of the Sea, the Inter-American Court of Human Rights, the International Criminal Court and the International Criminal Tribunals, and the European Court of

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[277] *Al-Saadoon and Mufdhi v. the United Kingdom*, 2 March 2010, Application No. 61498/08, ECHR 2010, para. 119, referring to *Öcalan v. Turkey* [GC], 12 May 2005, Application No. 46221/99, ECHR 2005-IV.

[278] Ibid., para. 120; B. Malkani, "The obligation to refrain from asssisting the use of the death penalty", *International and Comparative Law Quarterly*, vol. 62, No. 3 (2013), p. 523.

Justice, either do not seem to have addressed the question or have not recognized that subsequent practice of the parties may modify a treaty.[279]

(vi) State practice which is unrelated to judicial proceedings

137. There are a certain number of cases where States parties to a treaty follow a practice which they appear to consider as having effectively modified the treaty, without an international court or tribunal having pronounced on the matter.[280] Such cases seem to include, for example, the term "migratory species" under the Convention on Migratory Species, a concept which is now interpreted to cover species that are or become non-migratory due to climate change.[281] Such cases are, however, difficult to clearly identify[282] and it is particularly difficult to assess whether a specific practice implies the assumption or the agreement of the parties according to which the underlying treaty is thereby modified. It has been suggested in this context that it would be "entirely reasonable to postulate, for example, that States are very reluctant to permit dispute settlers to use subsequent conduct to modify a treaty relationship, but that States are quite happy amongst just themselves to view a treaty as modified based on mutual understandings."[283]

(vii) Evaluation

138. The caselaw of international courts and tribunals presents a mixed picture. While some have not addressed the question of whether subsequent practice by the parties can lead to a modification of a treaty, the International Court of Justice seems to have recognized the possibility in general terms, without however clearly applying it in a specific case. The Court also seems to prefer to convey the impression that a particular subsequent practice of the parties is within the range of a permissible interpretation of a treaty. The WTO Appellate Body, on the other hand, has rejected the possibility of a modification of the WTO Covered Agreements by the subsequent practice of the parties, whereas the European Court of Human Rights has recognized and applied this possibility in at least one case.[284]

139. This situation suggests the following conclusions: the WTO case demonstrates that a treaty may preclude the subsequent practice of the parties from having a modifying effect. Thus, the treaty itself governs the question in the first place. The case of the European Court of Human Rights also supports the point that the treaty itself is controlling in the first place and that it may conversely permit common standards, as they are manifested in national legislations or executive practice, on

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[279] See "Second report for the ILC Study Group on Treaties over Time", pp. 268-275, 282-285, 286-295 and 295-301 (see footnote 50 above).

[280] "Third report for the ILC Study Group on Treaties over Time", pp. 353-356 (see footnote 229 above).

[281] A. Trouwborst, "Transboundary wildlife conservation in a changing climate: adaptation of the Bonn Convention on Migratory Species and its daughter instruments to climate change", *Diversity*, vol. 4, No. 3 (2012), pp. 286-288; Buga, "Subsequent practice and treaty modification", at note 115 (see footnote 252 above).

[282] See generally on the difficulties of identifying conclusive State practice, Gardiner, *Treaty Interpretation*, p. 72 (see footnote 10 above).

[283] Murphy, "The relevance of subsequent agreement and subsequent practice for the interpretation of treaties", p. 83 (see footnote 66 above).

[284] *Al-Saadoon* (see footnote 269 above).

occasion to take precedence over the text of the treaty. Thus, ultimately much depends on the treaty or of the treaty provisions concerned.[285]

140. However, treaty rules which govern the matter (such as article 3.2. of the WTO Dispute Settlement Understanding, or a recognized understanding of a treaty as under the European Convention of Human Rights) are exceptional. The situation is more complicated in the case of treaties for which no comparable indications in one or the other direction exist. No clear residual rule for such cases can be discerned from the jurisprudence of the International Court of Justice. It is, however, possible to draw the conclusion that the Court, while finding that the possibility of a modification of a treaty by subsequent practice of the parties "cannot be wholly precluded as a possibility in law",[286] considered that applying such a modification should nevertheless be avoided, if at all possible. The Court is therefore prepared to accept very broad interpretations which may stretch the ordinary meaning of the terms of the treaty, and possibly even special meanings of those terms.

141. This conclusion from the jurisprudence of the International Court of Justice is in line with certain general considerations which were articulated during the debates on draft article 38 of the Vienna Convention. Today, the consideration that amendment procedures which are provided for in a treaty should not be circumvented by informal means seems to have gained more weight in relation to the equally true general observation that international law is often not as formalist as national law.[287] It should also be noted that the concern which was expressed by a number of States at the Vienna Conference, that the possibility of modifying a treaty by subsequent practice could create difficulties for domestic constitutional law, can no longer be simply dismissed.[288] And, finally, while it is true that the principle *pacta sunt servanda* is not formally called into question by a modification of a treaty by subsequent practice of all the parties, it is equally true that the stability of treaty relations may be called into question if an informal means of identifying agreement as subsequent practice would simply be recognized as being able to modify a treaty.[289] It is also worth emphasizing that even Waldock, in his

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[285] Buga, "Subsequent practice and treaty modification", at notes 126-132 (see footnote 252 above).

[286] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 303, at p. 353, para. 68.

[287] Murphy, "The relevance of subsequent agreement and subsequent practice for the interpretation of treaties", p. 89 (see footnote 66 above); Simma, "Miscellaneous thoughts on subsequent agreements and practice", p. 47 (see footnote 107 above); Hafner, "Subsequent agreements and practice: between interpretation, informal modification, and formal amendment", pp. 115-117 (see footnote 79 above); J. Alvarez, "Limits of change by way of subsequent agreements and practice", in *Treaties and Subsequent Practice*, G. Nolte, ed. (Oxford, Oxford University Press, 2013), p. 130.

[288] See *NATO Strategic Concept Case*, German Federal Constitutional Court, Judgment of 19 June 2001, Application 2 BvE 6/99 (English translation available from www.bundesverfassungsgericht.de/entscheidungen/es20011122_2bve000699en.html), paras. 19-21; S. Kadelbach, "Domestic constitutional concerns with respect to the use of subsequent agreements and practice at the international level", pp. 145-148; J. E. Alvarez, "Limits of change by way of subsequent agreements and practice", p. 130; I. Wuerth, "Treaty interpretation, subsequent agreements and practice, and domestic constitutions", pp. 154-159; and H. Ruiz Fabri, "Subsequent practice, domestic separation of powers, and concerns of legitimacy", pp. 165-166, all in *Treaties and Subsequent Practice*, G. Nolte, ed. (Oxford, Oxford University Press, 2013).

[289] See, for example, Kohen, "Uti possidetis, prescription et pratique subséquente à un traité dans l'affaire de l'Île de Kasikili/Sedudu devant la Cour internationale de Justice", p. 274 (see footnote 262 above) (in particular with respect to boundary treaties).

intervention at the Vienna Conference, limited the possible scope of a modification by subsequent practice of the parties by formulating that this should "not touch the main basis of the treaty".[290]

142. Thus, while there are indications in international jurisprudence that, absent indications in the treaty to the contrary, the agreed subsequent practice of the parties may lead to certain limited modifications of a treaty, the actual occurrence of that effect is not to be presumed. Instead, States and courts should make every effort to conceive an agreed subsequent practice of the parties as an effort to interpret the treaty in a particular way. Such efforts of interpretation can take place within a rather large scope since article 31 of the Vienna Convention does not accord primacy to one particular means of interpretation contained therein, but rather requires the interpreter to take into account all means of interpretation as appropriate.[291]

(b) Subsequent agreements

143. According to article 39 of the Vienna Convention on the Law of Treaties "[a] treaty may be amended by agreement between the parties". Article 31 (3) (a), on the other hand, refers to subsequent agreements "between the parties regarding the interpretation of the treaty and the application of its provisions", and does not seem to address the question of modification. As the WTO Appellate Body has held:

> [...] the term "application" in Article 31(3)(a) relates to the situation where an agreement specifies how existing rules or obligations in force are to be "applied"; the term does not connote the creation of new or the extension of existing obligations that are subject to a temporal limitation ....[292]

144. Articles 31 (3) (a) and 39, if read together, demonstrate that agreements which the parties reach subsequently to the conclusion of a treaty can interpret and modify the treaty.[293] An agreement under article 39 need not display the same form as the treaty which it amends (unless this treaty provides otherwise[294]). Like an agreement under article 31 (3) (a), an agreement under article 39 may be reached by more informal means, as well as be limited to modifying or suspending the obligations

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[290] *Official Records of the United Nations Conference on the Law of Treaties*, pp. 214-215, para. 57 (Sir Humphrey Waldock) (see footnote 12 above).

[291] Draft conclusion 1, para. 5, and accompanying commentary (A/68/10, chap. IV, sect. C.1 and sect. C.2); Hafner, "Subsequent agreements and practice: between interpretation, informal modification, and formal amendment", p. 117 (see footnote 79 above); some authors support the view that the range of what is conceivable as an "interpretation" is wider in case of a subsequent agreement or subsequent practice under article 31, paragraph 3, than in the case of interpretations by other interpreters, including the range for evolutive interpretations by courts or tribunals, for example, Gardiner, *Treaty Interpretation*, p. 243 (see footnote 10 above); Dörr, "Article 31. General rule of interpretation", p. 555, para. 76 (see footnote 11 above).

[292] WTO, Appellate Body, *EC — Bananas III*, 26 November 2008, paras. 391-393 (see footnote 268 above).

[293] Murphy, "The relevance of subsequent agreement and subsequent practice for the interpretation of treaties", p. 88 (see footnote 66 above).

[294] According to article 39, second sentence.

under the treaty for only one or a certain number of cases of its application.[295] As the International Court of Justice has held in the *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)* case:

> Whatever its specific designation and in whatever instrument it may have been recorded (the [River Uruguay Executive Commission] CARU minutes), this "understanding" is binding on the Parties, to the extent that they have consented to it and must be observed by them in good faith. They are entitled to depart from the procedures laid down by the 1975 Statute, in respect of a given project pursuant to an appropriate bilateral agreement.[296]

145. The lack of different formal requirements for an agreement under article 39 and for one under article 31 (3) (a) is one reason that some authors consider that an agreement under article 31 (3) (a) can also have the effect of modifying a treaty.[297] In any case, it may be necessary to determine whether — and if so, to what extent — an agreement is designed to modify (under article 39) or to interpret (under article 31 (3) (a)) a treaty,[298] in particular whether the distinction can be identified by formal criteria, or whether it merely depends on the presumed intentions of the parties. International case-law and State practice present a nuanced picture:

(i) International Court of Justice

146. In the *Pulp Mills on the River Uruguay* case, the International Court of Justice was confronted with a claim that the parties had set aside a procedure that was provided for in a treaty in the individual case of the disputed construction of certain pulp mills, by way of an "understanding" between the foreign ministers of Argentina and Uruguay on how to further proceed in the matter. The Court held:

> The Court concludes that the "understanding" of 2 March 2004 would have had the effect of relieving Uruguay of its obligations under Article 7 of the 1975 Statute, if that was the purpose of the "understanding", only if Uruguay had complied with the terms of the "understanding". In the view of the Court, it did not do so. Therefore the "understanding" cannot be regarded as having had the effect of exempting Uruguay from compliance with the procedural obligations laid down by the 1975 Statute.[299]

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[295] Sinclair, *The Vienna Convention on the Law of Treaties*, p. 107 (see footnote 102 above) with reference to Waldock, *Official Records of the United Nations Conference on the Law of Treaties*, p. 207, paras. 49-52 (see footnote 12 above); Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, p. 513, paras. 7, 9 and 11 (see footnote 49 above); Odendahl, "Article 39. General rule regarding the amendment of treaties", p. 706, at para. 16 (see footnote 11 above).

[296] *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010*, p. 14, at pp. 62-63, paras. 128 and 131; the Court then concluded that, in the case under review, that these conditions had not been fulfilled, at pp. 62-66, paras. 128-142.

[297] Aust, *Modern Treaty Law and Practice*, pp. 223-214 (see footnote 66 above) with examples.

[298] In judicial practice it is sometimes not necessary to determine whether an agreement has the effect of interpreting or modifying a treaty, see *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 6, at p. 29, para. 60 ("in the view of the Court, for the purposes of the present Judgment, there is no reason to categorize it either as confirmation or as a modification of the Declaration").

[299] *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010*, p. 14, at p. 63, para. 131.

147. Although the Court accepted that the "understanding" could have had the effect of "exempting Uruguay from compliance with the procedural obligations" of the treaty, it stopped short of recognizing that this would have had the effect of modifying the obligations under the treaty. This suggests that informal agreements which are alleged to derogate from treaty obligations should be narrowly interpreted. An agreement to modify a treaty is thus not excluded but also not to be presumed.[300]

(ii) Iran-United States Claims Tribunal

148. The Iran-United States Claims Tribunal has recognized, albeit only in an obiter dictum, that a subsequent agreement of the parties can lead to a modification of the Algiers Accords:

> [...] Yet, if the two Parties that created the Tribunal, i.e., Iran and the United States, were to agree to submit a case to the Tribunal, then this would arguably be sufficient to grant the Tribunal jurisdiction over such case, as it would constitute an international agreement modifying the Algiers Declarations with respect to the particular case. But this is not the issue here. [...][301]

149. This dictum suggests that the question whether an agreement merely interprets or rather modifies a treaty can be derived from its stated effect.

(iii) Free Trade Commission Note 2001: An agreement to interpret or to modify?

150. According to article 1131 (2) NAFTA the (intergovernmental) Free Trade Commission may adopt an interpretation of a provision of NAFTA which shall be binding on a Tribunal established under Chapter 11.[302] The Commission has resorted to this possibility by issuing an interpretative note on 31 July 2001 with regard to article 1105 (1) NAFTA (hereinafter: FTC Note).[303] The FTC Note clarified, inter alia, that the term "international law" as regards the minimum standard of treatment shall be understood as referring to "customary international law" and that "fair and equitable treatment" as well as "full protection and security" do not require treatment beyond that customary standard.[304] The Note has been interpreted differently by different Chapter 11 panels, in particular with regard to the question whether it should be considered as an authentic interpretation under article 1131 (2) NAFTA, a subsequent agreement under article 31 (3) (a) of the

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[300] Ibid., p. 66, para. 140; Crawford, "A consensualist interpretation of article 31 (3) of the Vienna Convention on the Law of Treaties", p. 32 (see footnote 110 above).

[301] Iran-United States Claims Tribunal, Interlocutory Award No. ITL 83-B1-FT (Counterclaim), *The Islamic Republic of Iran v. the United States of America*, Iran-USCTR vol. 38 (2004-2009), p. 77, at pp. 125-126, para. 132.

[302] C. H. Brower, "Why the FTC Notes of Interpretation constitute a partial amendment of NAFTA Article 1105", *Virginia Journal of International Law*, vol. 46, No. 2 (2006), pp. 349-350.

[303] "Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security."

[304] For the text of the North American Free Trade Agreement Notes of Interpretation of certain Chapter 11 Provisions of the Free Trade Commission]] see www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp; see also Brower, "Why the FTC Notes of Interpretation constitute a partial amendment of NAFTA Article 1105", pp. 351-354.

Vienna Convention, an (impermissible) amendment, or a (perhaps permissible) informal modification.[305] The following decisions are of particular significance:

151. The Panel in *ADF Group Inc. (v. United States)*, assessing whether the FTC Note constituted an interpretation or an amendment, relied on the fact that the note itself purported to be an interpretation:

> We observe in this connection that the FTC Interpretation of 31 July 2001 expressly purports to be an interpretation of several NAFTA provisions, including Article 1105 (1), and not an "amendment", or anything else. ... There is, therefore, no need to embark upon an inquiry into the distinction between an "interpretation" and an "amendment" of Article 1105 (1). But whether a document submitted to a Chapter 11 tribunal purports to be an amendatory agreement in respect of which the Parties' respective internal constitutional procedures necessary for the entry into force of the amending agreement have been taken, or an interpretation rendered by the FTC under Article 1131 (2), we have the Parties themselves — all the Parties — speaking to the Tribunal. No more authentic and authoritative source of instruction on what the Parties intended to convey in a particular provision of NAFTA, is possible.[306]

152. The Panel in *Methanex (v. United States)* interpreted the FTC Note as a subsequent agreement under article 31 (3) (a):

> With respect to Article 1105, the existing interpretation is contained in the FTC's Interpretation of 31st July 2001. Leaving to one side the impact of Article 1131 (2) NAFTA, the FTC's interpretation must also be considered in the light of Article 31 (3) (a) of the Vienna Convention as it constitutes a subsequent agreement between the NAFTA Parties on the interpretation of Article 1105 NAFTA ... It follows that any interpretation of Article 1105 should look to the ordinary meaning of the provision in accordance with Article 31 (1) of the Vienna Convention, and also take into account the interpretation of 31st July 2001 pursuant to Article 31 (3) (a) of the Vienna Convention.[307]

153. The Panel also addressed the question of whether the Note was interpretative in nature or implied an amendment to NAFTA:

> ... Even assuming that the FTC interpretation was a far-reaching substantive change (which the Tribunal believes not to be so with respect to the issue relating to this case), Methanex cites no authority for its argument that far-reaching changes in a treaty must be accomplished only by formal amendment rather than by some form of agreement between all of the parties.
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> Article 39 of the Vienna Convention on the Law of Treaties stipulates simply that "[a] treaty may be amended by agreement between the parties". No

[305] See, for example, Brower, "Why the FTC Notes of Interpretation constitute a partial amendment of NAFTA Article 1105", pp. 354-356 and 363; Roberts, "Power and persuasion in investment treaty interpretation: the dual role of States", pp. 180-181 and 216 (see footnote 101 above).

[306] *ADF Group Inc. v. United States of America* (Case No.ARB(AF)/00/1), ICSID Arbitration Under NAFTA Chapter Eleven, 9 January 2003, pp. 84-85, para. 177 (www.state.gov/documents/organization/16586.pdf).

[307] *Methanex Corporation v. United States of America*, UNCITRAL Arbitration under NAFTA, Chapter Eleven, Final Award on Jurisdiction and Merits, 9 August 2005, Part II, Chapter H, para. 23 (www.state.gov/documents/organization/51052.pdf).

particular mode of amendment is required and many treaties provide for their amendment by agreement without requiring a re-ratification. Nor is a provision on the order of article 1131 inconsistent with rules of international interpretation. Article 31 (3) (a) of the Vienna Convention provides that: "3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions.[308]

154. The Panel in *Pope and Talbot (v. Canada)*, while indicating a clear preference for considering the FTC Note an amendment, nevertheless proceeded on the basis of an assumption that the Commission's action was an "interpretation".[309]

155. Despite their different assessments concerning the FTC Note in question, the different tribunals did not identify any formal criteria by which a subsequent agreement under article 31 (3) (a) and an agreement to modify a treaty (under article 39 or otherwise) could be distinguished. They rather preferred, as far as possible, to consider the specific agreement of the parties under review as one on the interpretation of the treaty, and not as an amendment or a modification, and thereby accepted what the parties had purported to do.

(iv) United Nations Convention on the Law of the Sea

156. Examples from practice show that States parties to a treaty occasionally aim to bring about by way of a subsequent agreement what effectively appears to be a modification of a treaty, without using or successfully completing an available amendment procedure.

157. The Meeting of States Parties to the United Nations Convention on the Law of the Sea agreed to postpone the first election of judges to ITLOS from 16 May 1995 (the last possible date, according to Article 4 (3) of annex VI to the Convention) to 1 August 1996.[310] SPLOS took a similar decision with regard to the first election of the Commission on the Limits of the Continental Shelf ("CLCS").[311] Both decisions were adopted by consensus. Neither was adopted through the amendment procedures in articles 312-316 of the Convention,[312] and without a debate on their legality. It may be possible to regard these decisions as decisions not to apply the Convention in a particular case (which would leave the treaty obligation unaffected, but merely unenforced). However, in view of the need to provide a secure legal basis for the elections it is more plausible to assume that the parties intended to modify the Convention with respect to the particular case in order to ensure that effect.

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[308] Ibid., Part IV, Chapter C, paras. 20-21.

[309] *Pope & Talbot Inc. (Claimant) v. Government of Canada (Respondent)*, UNCITRAL Arbitration Under NAFTA Chapter Eleven, Award on Damages, 31 May 2002 , pp. 22-23, paras. 46-47 (http://italaw.com/sites/default/files/case-documents/ita0686.pdf).

[310] See report of the First Meeting of the States Parties the United Nations Convention on the Law of the Sea, held in New York on 21 and 22 November 1994 (SPLOS/3), p. 7.

[311] Although article 2, paragraph 2, of annex II to the United Nations Convention on the Law of the Sea provided a deadline for a decision until 16 May 1996, at the third Meeting of the States Parties the decision was delayed to 13 March 1997 (see SPLOS/5, para. 20).

[312] T. Treves, "The General Assembly and the Meeting of the States Parties in the implementation of the LOS Convention", in *Stability and Change in the Law of the Sea: The Role of the LOS Convention*, A. G. Oude Elferink, ed. (Leiden, Martinus Nijhoff, 2005), pp. 68-70.

158. Article 4 of annex II to the Convention provides for the possibility of an extension of the outer limits of the continental shelf beyond 200 nautical miles in accordance with article 76 of the Convention and requires that the requesting State "shall sub.nit particulars of such limits to the Commission along with supporting scientific and technical data as soon as possible but in any case within 10 years of the entry into force of this Convention for that State". When States demanded an extension of the time limit,[313] the Meeting of the States Parties decided that in the case of States for which the Treaty had entered into force before 13 May 1999, the ten-year time limit shall be taken to have commenced on 13 May 1999.[314] A background paper by the Secretariat expressed several ways to achieve this aim but favoured a subsequent agreement by the State Parties over a formal amendment process according to article 312 or 313 of the Convention or an implementation agreement.[315] At the meeting of the States Parties a majority stated that this issue was a procedural matter and would therefore fall within the competence of SPLOS.[316] The States Parties agreed to decide by consensus and that resort to articles 312-314 of the Convention was not necessary in this case. Given the clear terms of article 76 of the Convention, it is difficult to conceive the decision of the Meeting of the States Parties, even if it is regarded a procedural matter, as anything else than a modification of the provision.[317] At the same time, it is clear that the States Parties did not wish to explicitly recognize this.

(v) Montreal Protocol

159. The difficulty of drawing a line between an agreement regarding the interpretation of a treaty and an agreement on its modification is further exemplified by a decision of the Meeting of the Parties to the Montreal Protocol[318] by which several amendments to that instrument were adopted.[319] According to article 9 (5) of the Vienna Convention for the Protection of the Ozone Layer, amendments to the Protocol "shall enter into force between parties having accepted them on the ninetieth day after the receipt by the Depositary of notification of their ratification, approval or acceptance (...) by at least two-thirds of the parties to the protocol concerned, except as may otherwise be provided in such protocol."[320] The Montreal Protocol to the Vienna Convention foresees a special "adjustment procedure",[321]

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[313] See SPLOS/60, para. 61.

[314] See SPLOS/73, para. 81; and decision regarding the date of commencement of the ten-year period for making submissions to the Commission on the Limits of the Continental Shelf set out in article 4 of annex II to the United Nations Convention on the Law of the Sea (SPLOS/72).

[315] See background paper prepared by the Secretariat on issues with respect to article 4 of annex II to the United Nations Convention on the Law of the Sea (SPLOS/64), pp. 7-8; see also SPLOS/73, pp. 12-13.

[316] See SPLOS/73, p. 13.

[317] See, for example, German Federal Foreign Office, International Law Division, International Law Commission topic "Treaties over time" (14 February 2011), p. 7.

[318] Montreal Protocol on Substances that Deplete the Ozone Layer, 1987, (United Nations, *Treaty Series*, vol. 1522, No. 26369).

[319] See e.g. Brunnée, "COPing with consent: law-making under multilateral environmental agreements", p. 31 (see footnote 175 above); Churchill and Ulfstein, "Autonomous institutional arrangements in multilateral environmental agreement", p. 641 (see footnote 175 above).

[320] Vienna Convention for the Protection of the Ozone Layer, 1985, (United Nations, *Treaty Series*, vol. 1513, No. 26164).

[321] See J. Brunnée, "Reweaving the fabric of international law? Patterns of consent in environmental framework agreements", pp. 109-110 (see footnote 188 above).

which, as mentioned above, must be distinguished from the amendments to the Protocol to which article 9 (5) of the Vienna Convention applies.

160. At the second meeting of the Meeting of the Parties to the Montreal Protocol, held in London, from 27 to 29 June 1990, the parties took "Decision II/2" on several amendments to the Protocol. The amendments and their entry into force procedure are set out in annex II to the final report of the Meeting of the Parties. Article 2 of annex II reads:

> This Amendment shall enter into force on 1 January 1992, provided that at least twenty instruments of ratification, acceptance or approval of the Amendment have been deposited by States or regional economic integration organizations that are Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer. In the event that this condition has not been fulfilled by that date, the Amendment shall enter into force on the ninetieth day following the date on which it has been fulfilled."[322]

161. This MOP decision represents a subsequent agreement by the parties which arguably goes beyond an interpretation by providing a modification of the amendment procedure set forth in the Vienna-Montreal treaty regime. Subsequent practice of the parties has confirmed the 1990 decision through successive decisions using the same entry into force procedure.[323]

(vi) Subsequent agreements and amendment procedures

162. There are cases in which the parties to a treaty initiate a formal amendment procedure and at the same time reach a more informal subsequent agreement on the modification of the provision of the treaty which they begin to comply with before they have completed the formal amendment procedure. In such cases the question may arise whether the subsequent agreement can be taken as authentically articulating the treaty obligation as long as the formal amendment procedure is not completed: One example for this practice has arisen from the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposals (the "Basel Convention").[324] Based on a request which was formulated at the first COP by the Group of 77 States in 1994, the second COP decided, by consensus, to ban the transboundary movement of hazardous waste from OECD to non-OECD member States.[325] During the debates of the Second COP, some States, however expressed concern whether this decision should not rather be taken by way of the

[322] Report of the Second Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, London, 27-29 June 1990 (UNEP/OzL.Pro.2/3), decision II/2 and annex II, p. 39.

[323] For a list of the amendments to the Montreal Protocol, see United Nations Environment Programme (UNEP), Ozone Secretariat (http://ozone.unep.org/new_site/en/Treaties/treaty_text.php?treatyID=3).

[324] Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (United Nations, *Treaty Series*, vol. 1673, No. 28911) — see p. 57.

[325] See report of the Second Meeting of the Conference of the Parties to the Basel Convention on Control of Transboundary Movements of Hazardous Wastes and their Disposal, Geneva, 21-25 March 1994 (UNEP/CHW.2/30, decision II/12).

formal amendment procedure under article 17 of the Basel Convention.[326] Criticism continued to be expressed, particularly in the domestic sphere of some States Parties.[327] At its third meeting, in 1995, the COP decided to initiate a formal amendment of the Basel Convention with a view of prohibiting the transboundary movement of hazardous waste from OECD to non-OECD countries. This amendment has still not entered into force under the procedure which is provided for under article 17 of the Convention. During the debates of the third COP, several States expressed the view that the decision to submit this matter to a formal amendment procedure did not deprive the prior COP decision of its binding character, while others expressly rejected this view.[328]

(vii) Distinctions between subsequent agreements

163. The preceding examples from the jurisprudence and State practice suggest that it is often very difficult to draw a distinction between agreements of the parties under a specific treaty provision which attributes binding force to subsequent agreements, simple subsequent agreements under article 31 (3) (a) which are not binding as such, and, finally, agreements on the modification of a treaty under article 39. There do not seem to be any formal criteria, apart from the ones which may be provided for in the applicable treaty itself, which are recognized as distinguishing these different forms of subsequent agreements. It is clear, however, that States and international courts are generally prepared to accord States parties a wide scope for the interpretation of a treaty by way of a subsequent agreement. This scope may stretch and even go beyond the ordinary meaning of the terms of the treaty. The recognition of this broad scope for the interpretation of a treaty goes hand in hand with reluctance by States and courts to recognize that an agreement actually has the effect of modifying a treaty.[329] The case of the Basel Convention need not necessarily be interpreted as an ex post recognition by the parties that the decision by the COP required a formal amendment, but can also be seen as an effort to avoid disagreement among themselves and to use a "safe" way of proceeding even if this was not strictly necessary. It appears, however, that the initiation of a formal amendment procedure normally suggests that the parties consider such a procedure to be legally required.

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[326] See decision III/1, adopted by the Third Meeting of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Geneva, 18-22 September 1995 (UNEP/CHW.3/35); see also G. Handl, "International 'lawmaking' by Conferences of the Parties and other politically mandated bodies", in *Developments of International Law in Treaty Making*, R. Wolfrum and V. Röben, eds. (Berlin, Springer, 2005), p. 132.

[327] In Australia, for example, Members of Parliament worried about "a loss of parliamentary sovereignty" See Handl, "International 'lawmaking' by Conferences of the Parties and other politically mandated bodies", p. 132).

[328] See report of the Third Meeting of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Geneva, 18-22 September 1995 (UNEP/CHW.3/34); see also Handl, "International 'lawmaking' by Conferences of the Parties and other politically mandated bodies".

[329] It may be that States, in diplomatic contexts outside court proceedings, tend to acknowledge more openly that a certain agreement or common practice amounts to a modification of a treaty (see Murphy, "The relevance of subsequent agreement and subsequent practice for the interpretation of treaties", p. 83 (see footnote 66 above)).

164. The presumption that a subsequent agreement which does not satisfy the procedural requirements of the amendment clause of a treaty should be interpreted narrowly as not to purporting to modify the treaty, appears to be even stronger in cases in which the subsequent agreement would affect the object and purpose of the treaty, i.e. an essential element of the treaty.[330] One of those essential elements may be the creation of certain individual rights by the treaty.[331] If, however, a subsequent agreement is clear enough it may even contribute to modifying an essential element of a treaty.[332]

(c) Conclusion

165. The caselaw of international courts and tribunals and State practice confirm that while the modification (or amendment) of a treaty by way of a subsequent agreement or agreed subsequent practice can theoretically be distinguished from its interpretation, in practice, as the Commission has put it rather cautiously, "there may be a blurring of the line between the interpretation and the amendment of a treaty by subsequent practice".[333] The International Court of Justice has not discussed criteria for distinguishing an interpretation from a modification by way of subsequent agreement or agreed subsequent practice. The most reasonable approach seems to be that the line between interpretation and modification cannot be determined by abstract criteria but must rather be derived, in the first place, from the treaty itself, the character of the specific treaty provision at hand, and the legal context within which the treaty operates, and the specific circumstances of the case. In this context an important consideration is how far an evolutive interpretation of the pertinent treaty provision is possible. In the case concerning the *Dispute regarding Navigational and Related Rights*,[334] for example, the International Court of Justice could leave the question open whether the term "comercio" had been modified by the subsequent practice of the parties since it decided that it was possible to give this term an evolutive interpretation.

166. The preceding considerations lead to the following conclusion:

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[330] See guideline 3.1.5. of the Commission's Guide to Practice on Reservations to Treaties (A/66/10/Add.1, chap. IV. F.2), at p. 351; Aust, *Modern Treaty Law and Practice*, p. 214 (see footnote 66 above).

[331] See Human Rights Committee, General Comment No. 26 on issues relating to the continuity of obligations under the International Covenant on Civil and Political Rights (CCPR/C/21/Rev.1/Add.8/Rev.1), para. 4 (which, however, addresses the power to denounce the International Covenant on Civil and Political Rights); see report of the Study Group of the International Law Commission on the topic "Fragmentation of international law: difficulties arising from diversification and expansion of international law (A/CN.4/L.682 and Corr.1), para. 108 (which, however, addresses the question of *lex specialis*); Buga, "Subsequent practice and treaty modification", at notes 152-155 (see footnote 252 above).

[332] See, for example, Simma,"Miscellaneous thoughts on subsequent agreements and practice", p. 46 (see footnote 107 above); Crawford, "A consensualist interpretation of article 31 (3) of the Vienna Convention on the Law of Treaties", p. 31 (see footnote 110 above) (referring to the agreements on the privatization of the international telecommunications satellite organizations INMARSAT, EUTELSAT and INTELSAT which were reached outside the regular amendment procedures); Roberts, "Power and persuasion in investment treaty interpretation: the dual role of States" (see footnote 101 above).

[333] *Yearbook of the International Law Commission, 1964*, vol. II, (United Nations publication, Sales No. E.65.V.2), p. 60, para. 25.

[334] *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009*, p. 213, at pp. 242-243, paras. 64-66.

Draft conclusion 11
Scope for interpretation by subsequent agreements and subsequent practice

(1) The scope for interpretation by subsequent agreements or subsequent practice as authentic means of interpretation under article 31 (3) may be wide.

(2) It is presumed that the parties to a treaty, by a subsequent agreement or subsequent practice, intend to interpret the treaty, not to modify it. The possibility of modifying a treaty by subsequent practice of the parties has not been generally recognized.

VIII. Future programme of work

167. According to the original plan of work,[335] the third report, for the sixty-seventh session (2015), will address subsequent agreements and subsequent practice in relation to constituent treaties of international organizations. The report might also deal with the practice of treaty bodies, the role of national courts, and other matters which members of the Commission or States may wish to see addressed within the framework of the topic. Depending on the progress made, a final report might be submitted for the sixty-eighth session (2016) which would address possibly remaining matters. The Commission could then undertake a review of the draft conclusions as a whole, with a view to their final adoption.

[335] See A/67/10, para. 238.

Annex

Proposed draft conclusions

Draft conclusion 6
Identification of subsequent agreements and subsequent practice

The identification of subsequent agreements and subsequent practice under article 31 (3) and article 32 requires careful consideration, in particular of whether the parties, by an agreement or a practice, assume a position regarding the interpretation of a treaty, or whether they are motivated by other considerations.

Draft conclusion 7
Possible effects of subsequent agreements and subsequent practice in interpretation

(1) Subsequent agreements and subsequent practice under articles 31 (3) and 32 can contribute to the clarification of the meaning of a treaty, in particular by narrowing or widening the range of possible interpretations, or by indicating a certain scope for the exercise of discretion which the treaty accords to the parties.

(2) The value of a subsequent agreement or subsequent practice as a means of interpretation may, inter alia, depend on their specificity.

Draft conclusion 8
Forms and value of subsequent practice under article 31 (3) (b)

Subsequent practice under article 31 (3) (b) can take a variety of forms and must reflect a common understanding of the parties regarding the interpretation of a treaty. Its value as a means of interpretation depends on the extent to which it is concordant, common and consistent.

Draft conclusion 9
Agreement of the parties regarding the interpretation of a treaty

(1) An agreement under article 31 (3) (a) and (b) need not be arrived at in any particular form nor be binding as such.

(2) An agreement under article 31 (3) (b) requires a common understanding regarding the interpretation of a treaty of which the parties are aware. The number of parties that must actively engage in subsequent practice in order to establish an agreement under article 31 (3) (b) may vary. Silence on the part of one or more parties can, when the circumstances call for some reaction, constitute acceptance of the subsequent practice.

(3) A common subsequent agreement or practice does not necessarily indicate an agreement between the parties regarding the interpretation of a treaty, but may instead signify their agreement temporarily not to apply the treaty or to establish a practical arrangement (modus vivendi).

Draft conclusion 10
Decisions adopted within the framework of a Conference of States Parties

(1) A Conference of States Parties, under these draft conclusions, is a meeting of States parties pursuant to a treaty for the purpose of reviewing or implementing the treaty, except if they act as members of an organ of an international organization.

(2) The legal effect of a decision adopted within the framework of a Conference of States Parties depends primarily on the treaty and the applicable rules of procedure. Depending on the circumstances, such a decision may embody a subsequent agreement under article 31 (3) (a), or give rise to subsequent practice under article 31 (3) (b) or article 32.

(3) A decision adopted within the framework of a Conference of States Parties embodies a subsequent agreement or subsequent practice under article 31 (3) in so far as it expresses agreement in substance between the parties regarding the interpretation of a treaty, regardless of the form and the procedure by which the decision was adopted.

Draft conclusion 11
Scope for interpretation by subsequent agreements and subsequent practice

(1) The scope for interpretation by subsequent agreements or subsequent practice as authentic means of interpretation under article 31 (3) may be wide.

(2) It is presumed that the parties to a treaty, by a subsequent agreement or subsequent practice, intend to interpret the treaty, not to modify it. The possibility of modifying a treaty by subsequent practice of the parties has not been generally recognized.